Supreme Court, U.S.
FILED

95 • 884 OCT 18 1995

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No. 95-

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1995

JOSEPH MOCCO,

Petitioner,

v.

THE STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

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PETITION FOR WRIT OF CERTIORARI

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On the Petition
October 11, 1995

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the New Jersey Supreme Court applied an overly broad interpretation of what constitutes an "enterprise" under the State RICO ACT?

2. Whether the New Jersey State RICO Act is unconstitutionally vague and the application thereof violative of due process?

3. Whether the RICO conviction of petitioner must be reversed as the proof failed to establish petitioner's involvement with, or knowledge of, a RICO enterprise and the evidence failed to establish a pattern of racketeering activity?

4. Whether the government's pleadings were deficient as to the pleading requirements of the criminal RICO violations set forth in the indictment and failed to set forth the necessary elements of a RICO conspiracy.

5. Whether the State failed to demonstrate or prove the existence of an ongoing enterprise independent from the alleged racketeering acts?

6. Whether the trial court erred when it instructed the jury as to conspiracy to commit racketeering acts where the proofs were insufficient to substantiate the same?

7. Whether the trial court erred in permitting the admission of the hearsay statement made by Joseph Lomuscio?

8. Whether the jury was tainted and whether the trial court's denial of petitioner's motion for a mistrial and to interview jurors was erroneous?

9. Whether the trial court erred in denying petitioner's motion to disqualify the trial judge from sitting in this matter?

LIST OF PARTIES

Parties to this petition are Joseph Mocco and the State of New Jersey (represented by the Office of the Attorney General of the State of New Jersey).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 *U.S.C.A.* Sec. 1257(a) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised, under the United States.

N.J.S.A. 2C:41-2 provides:

> a. It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which he has participated as a principal within the meaning of N.J.S. 2C:2-6 to use or invest, directly or indirectly, any part of the income, or the proceeds of the income, in acquisition of any interest in, or the establishment or operation of any enterprise which is engaged in or the activities of which affect trade or commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer or of assisting another to do so, shall not be unlawful under this section, provided that the sum total of the securities of the issuer held by the purchaser, the members of his family, and his or their accomplices in any pattern of racketeering activity or in the collection of an unlawful debt does not amount in the aggregate to 1% of the outstanding securities of any one class, or does not, either in law or fact, empower the holders thereof to elect one or more directors of the issuer, provided further, that if, in any proceeding involving an alleged investment in viola-

tion of this section, it is established that over half of the defendant's aggregate income for a period of 2 or more years immediately preceding the investment was derived from a pattern of racketeering activity, a rebuttable presumption shall arise that the investment included income derived from a pattern of racketeering activity.

b. It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in or activities of which affect trade or commerce.

c. It shall be unlawful for any person employed by or associated with any enterprise engaged in or activities of which affect trade or commerce to conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

d. It shall be unlawful for any person to conspire as defined by N.J.S. 2C:5-2, to violate any of the provisions of this section.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. _____

JOSEPH MOCCO,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

The petitioner, Joseph Mocco, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of New Jersey, entered in the above-entitled proceeding on July 20, 1995.

OPINIONS BELOW

The opinion of the New Jesey Supreme Court (whose review is sought) is reported at *State v. Ball,* 141 *N.J.* 142, 661 *A.*2d 251 (1995) and is annexed to this petition as 1a, *infra.*

The opinion of the Superior Court of New Jersey, Appellate Division, is reoprted at *State v. Ball,* 268 *N.J. Super.* 72, 632 *A.*2d 1222 (App. Div. 1993), *certification granted, State v. Ball,* 135 *N.J.* 304, 639 *A.*2d 304 (1994), affirmed 141 *N.J.* 142, 661 *A.*2d 251 (1995).

JURISDICTION

On July 20, 1995, the Supreme Court of New Jersey affirmed petitioner's criminal convictions. The jurisdiction of this Court to review the judgment of the Supreme Court of New Jersey is invoked under Title 28 *U.S.C.A.* Sec. 1257.

STATEMENT OF THE CASE

Defendant-petitioner Joseph Mocco ("petitioner"), along with co-defendants, was prosecuted and convicted under the New Jersey Racketeer Influenced and Corrupt Organizations Act ("RICO Act"). The case *sub judice* is the first criminal prosecution under the New Jersey RICO statute.

The convictions arise from petitioner's alleged participation in an unlawful scheme to dump solid waste generated in New York at several unauthorized New Jersey sites. Specifically, petitioner Joseph Mocco, with co-defendants George Hurtuk, Joseph Dulanie, Patrick Ball, Michael Havan, and Richard Bassi were named in a 116 count indictment returned by a State Grand Jury. (Aa* 1-71). During the time frame involved, petitioner Mocco was the North Bergen town clerk, George Hurtuk was a License Inspector for North Bergen, and Joseph Dulanie was the Deputy Chief of Police. The indictment charged petitioner with conspiracy to commit racketeering in violation of *N.J.S.A.* 2C:41-1(d), a substantive racketeering offense, in violation of *N.J.S.A.* 2C:41-2, along with various bribery offenses and official misconduct.

Numerous pretrial motions to dismiss the indictment as well as various counts thereof, and to suppress evidence obtained as a result of electronic surveillance, were made. The Honorable Burrell Ives Humphreys, J.S.C. (now J.A.D.), dismissed Counts 14 and 15 but otherwise denied the motions. Motions for a severance were made, and Judge Humphreys granted the severance application and ruled that the

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*Reference "Aa" is to the appendix filed in state court.
Reference "T" is to the trial transcript.
Reference "1a" is to the supplemental appendix annexed to this Petition.

initial trial would proceed against the petitioner, Hurtuk, Dulanie, and defendants Bassi, Ball, Big Apple Leasing, Harvan and Dancy (who was subsequently dropped from the first trial).

The State alleged that the petitioner and the other defendants were all part of a criminal "enterprise" as set forth in *N.J.S.A.* 2C:41-1 *et. seq.*, the purpose of which was the dumping of items at various sites located in North Bergen, New Jersey, and at the Hackensack Meadowlands Development Commission (HMDC) Balefill Facility in North Arlington, and Newark, New Jersey. Co-defendants Harvan and Bassi were accused of being "dirt brokers" who procured land and organized the dumping procedures. It was alleged that petitioner received payment or bribes in order to allow dumping in the town without first securing the necessary federal and state licensing. Patrick Ball and Big Apple were accused of being the "haulers" who actually hauled loads to New Jersey to dump them for a lower "rate."

The enterprise allegedly created a profit by charging less to New York haulers to dump in New Jersey. Defendants Bassi and Harvan allegedly received sums of money without incurring expenses, while the petitioner allegedly authorized the dumping after receiving a portion of the proceeds. The State also alleged that the expenses of the "enterprise" were "laundered" through the CMB Enterprise account, which is a company owned by defendants Harvan and Bassi.

The HMDC maintained jurisdiction over dumping facilities in Hudson, Bergen and Essex Counties. A confusing morass of agencies claim jurisdiction over the necessary licenses and/or permits for the area. (21T 49-23 to T3-9; 21T67-5 to 10-16; 28T127-21 to 129-17; 39T67-9 to 69-8; 54T196-16 to 197-5; 84T43-2 to 7).

A Michael Kane, formerly affiliated with BPU, observed dumping activity. After meeting with an investigator for the environmental prosecution section of the New Jersey State Division of Criminal Justice ("DCJ"), an investigator was assigned to conduct surveillance at West Side Avenue in North Bergen. Investigators followed persons identified as Patrick Ball to a Dunkin' Donuts, where a discussion which is alleged to have referred to the dumping operation was overheard on a pay phone.

State investigators testified that trucks, most with New York license plates, dumped concrete, wood, asphalt, and metal debris. Investigator Smith of the DCJ, while wearing recording equipment, met with a "checker," who was questioned about the jurisdiction of the property. The "checker" stated that it was North Bergen's jurisdiction, and that a road was being filled, and to go to the Clerk's office. (34T84-1 to 22). Hurtuk spoke to the investigator, and informed the investigator that he was investigating the dumping, and that he was the town license official.

After a discussion between the two men, arrangements were made to meet at the Town Hall to review the dumping licenses. (35T17-1 to 21-13). Smith recorded a conversation with the town clerk, petitioner Mocco. Mocco indicated that he knew that rock was being moved. (36T118-1 to 119-2; 36T131-22 to 131-25).

From on or about April 4, 1986, to June 3, 1986, a twenty-four hour visual videotape, aerial photograph and wiretap operation was conducted. (21T156-8 to 158-15). New York trucks were observed in the area under surveillance during this period. The State alleged that, despite evidence to the contrary, dumping could be inferred from the absence of vegetation in the area as seen in photographs. Defendant Harvan was arrested by a North Bergen police officer, but the officer's complaint was dismissed without a hearing. Richard Bassi was placed under surveillance on or about May 7, 1986. Petitioner Mocco never met, saw, or spoke with Harvan or Bassi until the day of his arrest.

Pursuant to an order of the Superior Court of New Jersey, Law Division, the interception of various telephone facilities was authorized. The home telephone of co-defendant Bassi was tapped for a twenty day period. Two ten day extensions were subsequently granted. Wiretaps of the Harvan home, the public telephone at Walsh trucking, the residence of co-defendants Hurtuk and Dulanie, and the "checker" were authorized under separate interception orders. In a conversation intercepted by way of the wiretaps, co-defendant Dulanie told co-defendant Havan that the State had incorrectly surmised that someone was being "paid off." (Aa228,232-237).

The State alleged that the "entrprise" resurfaced after the closing of the North Bergen site of the HMDC Balefill site (90% of the dumping in this case went to the HMDC Balefill in North Arlington and Newark, while 10% went to North Bergen). Surveillance at that site revealed that trucks with New York plates and without proper decals had entered the facility using fraudulent forms, which were accepted by a "checker." The State also claimed that the enterprise garnered a sizable profit from the alleged illegal dumping, and that this profit was divided amongst other defendants, and that approximately $27,000 was paid to the petitioner Mocco.

Trial commenced before Judge Humphreys on October 11, 1988, and a verdict was returned on April 17, 1989, after 87 days of trial and deliberations. The petitioner was acquitted of the substantive RICO charges.

During jury deliberations, there was an alleged attempt to tamper with one of the jurors—a Michael Biondo. Biondo was interviewed by Judge Humphreys in chambers on two occasions. Petitioner Mocco moved for the excusal of Biondo, and the motion was granted. (Aa677-715). After the juror's excusal, the remaining jurors were told that

Biondo had been excused because of an undisclosed problem. The jurors were warned not to speculate as to the reason for the excusal, and were told that the reasons were unrelated to the issues that were before them.

Thereafter, the Court informed counsel for the defendants that a court attendant had witnessed Biondo, after his excusal, say that "you can't trust the lawyers." The court attendant stated that thereafter, several jurors were in the jury room where the outburst had taken place. Following the verdict, a motion to interview Biondo and another juror was denied. (Aa675-676). (Incredibly, Judge Humphreys referred to the dismissed juror as a "fine juror," revealing his bias. *See Point IX, infra*).

At trial, counsel for the defense consulted with an audio expert with regard to the inspection of the tape recorded conversations between undercover investigators and defendants which had been introduced at trial. It was this expert's opinion that some of the tapes he had examined were altered. (Aa778-802, 803, 808). The tapes provided to the expert were copies which had been used at trial because the originals necessitated the use of special audio equipment not available at trial. An emergent application to the Appellate Division of the New Jersey Superior Court was made, seeking a remand for the limited purpose of moving for a new trial based upon the findings of the audio expert. The application was granted, and the defendants sought an order compelling the production of the original tapes for examination.

The Court was thereafter advised by the prosecutor that four of the seven original tapes were missing, only after an order permitting the inspection was granted. The defendants moved for a new trial on two grounds: the State's failure to comply with a Court Order requiring it to produce the original tapes; or upon newly disclosed evidence (the possibility of tampering). Both motions were denied. (Aa 749-a-f and 750-770).

The Appellate Division of the New Jersey Superior Court affirmed petitioner's convictions on August 6, 1993. *State v. Ball,* 268 *N.J. Super.* 72, 632 *A.*2d 1222 (App. Div. 1993), affirmed 141 *N.J.* 142, 661 *A.*2d 251 (1995).

In appealing his conviction, petitioner raised several RICO issues, as well as many non-RICO issues. These federal constitutional issues were raised at trial and on appeal in the state appellate courts. The argument that the state RICO statute was unconstitutionally vague was raised on appeal as plain error.

Petitioner filed a petition for certification with the New Jersey Supreme Court. The Supreme Court of New Jersey granted petitioner's petition for certification, "limited solely to the issues raised regarding construction of the New Jersey Racketeer Influenced and Corrupt

Organizations Act." *State v. Ball,* 135 *N.J.* 304, 305, 639 *A.*2d 304 (1994).

On July 20, 1995, petitioner's convictions were affirmed by the Supreme Court of New Jersey. *State v. Ball,* 141 *N.J.* 142, 661 *A.*2d 251 (1995.)

REASONS FOR GRANTING THE WRIT

POINT I. THE NEW JERSEY SUPREME COURT APPLIED AN OVERLY BROAD INTERPRETATION OF WHAT CONSTITUTES AN "ENTERPRISE" UNDER THE STATE RICO ACT.

In the case *sub judice,* the Supreme Court of New Jersey granted certification as to issues concerning the construction and interpretation of the New Jersey State RICO Act. Specifically, the Supreme Court of New Jersey addressed the issue of whether the provisions of the New Jersey RICO Act are defined properly in light of contradictory federal case law, whether the provisions of the New Jersey RICO Act, as applied, are unconstitutionally vague, and whether the provisions of the Act violate due process.

The first issue addressed in this Petition is what qualifies as a RICO enterprise, and whether the State proved the existence of such enterprise in this case.

It is well-settled that in order to sustain a RICO conviction the prosecution must establish the existence of an enterprise, and the existence of that enterprise must be both separate and distinct from the alleged predicate acts. *See United States v. Turkette,* 452 *U.S.* 576, 593, 101 *S.Ct.* 2524, 69 *L.Ed.*2d 246 (1981). As stated in *Turkette:*

> The enterprise is an entity for present purposes, a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. (citations omitted). The former is proved by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proofs used to establish the separate elements may, in particular cases, coalesce, proof of one does not necessarily establish the other. *Id.*

Accordingly, in order to sustain a conviction for conspiracy to violate the State RICO statutes, it was incumbent upon the State to prove beyond a reasonable doubt the existence of an enterprise.

Presently, there is a split of authority among the Federal Circuits over the proper scope of the RICO enterprise element, and the requirements for establishing this element. The First, Second, Sixth, Seventh, Ninth, Eleventh, and D.C. Circuits have not grafted additional requirements on *Turkette* and these Circuits adhere closely to the language of that decision. According to these Circuits, an enterprise exists where there is an ongoing organization, formal or informal, evidence that

members of the organization function as a continuing unit, and evidence that the enterprise is an entity separate and apart from the pattern of activity in which it is engaged. *United States v. Doherty,* 867 *F.*2d 47, 67-68 (1st Cir.), *cert. denied sub nom., Salerno v. United States,* 492 *U.S.* 918, 109 *S.Ct.* 3243, 106 *L.Ed.*2d 590 (1989); *Fleischhauer v. Feltner,* 879 *F.*2d 1290, 1297 n. 4 (6t Cir. 1989), *cert. denied,* 493 *U.S.* 1074, 110 *S.Ct.* 1122, 107 *L.Ed.*2d 1029 (1990); *United States v. Alvarez,* 860 *F.*2d 801, 819 (7th Cir. 1988), *cert. denied,* 490 *U.S.* 1051, 109 *S.Ct.* 1966, 104 *L.Ed.*2d 434 (1989); *United Energy Owners v. United States Energy Management,* 837 *F.*2d 356, 362 (9th Cir. 1988); *United States v. Perholz,* 842 *F.*2d 343, 363 (D.C.Cir.), *cert. denied,* 488 *U.S.* 821, 109 *S.Ct.* 65, 102 *L.Ed.*2d 42 (1988); *United States v. Qaoud,* 77 *F.*2d 1105, 1114-16 (6th Cir. 1985), *cert. denied sub nom., Callanan v. United States,* 475 *U.S.* 1098, 106 *S.Ct.* 1499, 89 *L.Ed.*2d 899 (1986); *United States v. Russo,* 796 *F.*2d 1443, 1462; *United States v. Mazzei,* 700 *F.*2d 85, 88-89 F(2d Cir.), *cert. denied,* 461 *U.S.* 945, 103 *S.Ct.* 2124, 77 *L.Ed.*2d 1304 (1983).

The Eleventh and Second Circuits have taken the broadest approach concerning the scope of the RICO enterprise element. The Eleventh Circuit has defined a RICO enterprise "as any group of persons 'whose association, however loose or informal, furnishes the vehicle for commission of two or more predicate crimes.' " *United States v. Russo, supra,* 796 *F.*2d at 1462; *United States v. Hewes,* 729 *F.*2d 1302, 1310-12 (11th Cir. 1984), *cert. denied sub nom., Caldwell v. United States,* 469 *U.S.* 1110, 105 *S.Ct.* 790, 83 *L.Ed.*2d 783 (1985); *United States v. Cagnina,* 697 *F.*2d 915, 920-21 (11th Cir.), *cert. denied,* 464 *S.Ct.* 856, 104 *S.Ct.* 175, 78, *L.Ed.*2d 157 (1983) (informal association with the common purpose of making money from diverse criminal activity is sufficient to constitute a RICO "enterprise").

The Second Circuit has held that an enterprise exists if there is a group of individuals with a community of interest and a continuing core of personnel. The Second Circuit has upheld application of RICO "to situations where the enterprise was, in effect, no more than the sum of the predicate racketeering acts." *United States v. Bagaric,* 706 *F.*2d 42, 55 (2d Cir.), *cert. denied,* 464 *U.S.* 840, 104 *S.Ct.* 134, 78 *L.Ed.*2d 128 (1983); *United States v. Mazzei, supra,* 700 *F.*2d at 88-89; *United States v. Errico,* 635 *F.*2d 152, 156 (2d Cir. 1980), *cert. denied,* 453 *U.S.* 911, 101 *S.Ct.* 3142, 69 *L.Ed.*2d 994 (1981).

The Third, Fourth, Fifth, Eighth and Tenth Circuits have taken a narrower approach to the enterprise element. Courts in these Circuits require that the enterprise be an ongoing organization with a purpose greater than the commission of predicate acts, and that it have an "ascertainable structure." This structure is evidenced, for example, by a mechanism for decision making and for controlling the affairs of the

group. *Calcasieu Marine Nat. Bank v. Grant,* 943 *F.*2d 1453, 1461 (5th Cir. 1991); *United States v. Sanders,* 928 *F.*2d 940, 943-44 (10th Cir.) *cert. denied,* __*U.S.*__, 112 *S.Ct.* 142, 116 *L.Ed.*2d 109 (1991); *United States v. Tillett,* 763 *F.*2d 628 (4th Cir. 1985); *United States v. Riccobene, supra,* 709 *F.*2d at 222-24; *United States v. Bledsoe,* 674 *F.*2d 647, 665 (8th Cir.), *cert. denied, sub nom, Phillips v. United States,* 459 *U.S.* 1040, 103 *S.Ct.* 456, 74 *L.Ed.*2d 608 (1982); *United States v. Griffin,* 660 *F.*2d 996, 1000 (4t Cir. 1981), *cert. denied, sub nom, Garonzik v. United States,* 454 *U.S.* 1156, 102 *S.Ct.* 1029, 71 *L.Ed.*2d 313 (1982).

In the case *sub judice*, the trial judge, while acknowledging the split of authority, rejected the narrower construction. 632 *A.*2d 1222 at 1239. The Appellate Division agreed with Judge Humphreys, 632 *A.*2d at 1239, as did the New Jersey Supreme Court. The State Supreme Court held that under the RICO Act "enterprise" is an element separate from the "pattern of racketeering activity," and that the State must prove the existence of both in order to establish a RICO violation. 661 *A.*2d at 261. The Court also found that "Nevertheless, evidence that serves to establish such an enterprise need not be distinct or different from the proof that establishes the pattern of racketeering." *Id.*

The State Supreme Court also held that, because the enterprise is distinct from the incidents constituting the pattern of activity, it must have an "organization." *Id.* As the Court stated:

> The organization of an enterprise need not feature an ascertainable structure or a structure with a particular configuration. The hallmark of an enterprise's organization consists rather in those kind of interactions that become necessary when a group, to accomplish its goal, divides among its members the tasks that are necessary to achieve a common purpose. The division of labor and the separation of functions undertaken by the participants serve as the distinguishing marks of the "enterprise" because when a group does so divide and assemble its labors in order to accomplish its criminal purposes, it must necessarily engage in a high degree of planning, cooperation and coordination, and thus, in effect, constitute itself as an "organization." *Id.*

Petitioner submits that this broad view of what constitutes an "enterprise" is improper, and conflicts with the decision of other United States Court of appeals, and with the decisions of several state courts of last resort. Additionally, the New Jersey Supreme Court has decided an important question of federal law which should be settled by this Court.

Petitioner submits that a RICO "enterprise" must be more than an informal group created to perpetrate acts of racketeering. *United States*

v. Bledsoe, 674 *F.*2d 647, 663 (8th Cir. 1982). As stated in *Bledsoe,* the term "enterprise" must signify an association that is substantially different from the acts which form the "pattern of racketeering." See *Bledsoe, supra* at 664. "A contrary interpretation would alter the simple elements of the offense as determined by Congress." *Id.* at 664.

The Court in *Bledsoe* required three distinct characteristics in order to prove the existence of an association in fact RICO enterprise: 1) a common or shared purpose which animates those associated with the enterprise and reveals the association in fact enterprise to be an ongoing organization; 2) the enterprise must function as a continuing unit; and 3) there must be an ascertainable structure distinct from that inherent in the conduct or the pattern of the racketeering activity. *Bledsoe, supra,* at 665. *See H.J. Inc. v. Northwestern Bell Co.,* 492 *U.S.* 229, 109 *S.Ct.* 2893, 106 *L.Ed.*2d 195 (1989), where the court held that the establishment of the relatedness of racketeering activities is not in and of itself sufficient to satisfy the pattern element. In order to establish a RICO pattern it must also be shown that the predicates themselves amount to, or otherwise constitute, a threat of continuing racketeering activity. *See H.J., Inc., supra,* at 109 *S.Ct.* at 2901.

Petitioner submits that unless proof of the enterprise also requires proof of a structure, distinct from the organization necessary to commit the predicate offenses, it will be used to punish merely the commission of two or more predicate offenses within a ten-year period. *See Bledsoe, supra,* 674 *F.*2d at 664. Accordingly, this Court should grant the Petition for Certiorari to settle the conflict amongst the federal circuits.

POINT II. THE NEW JERSEY RICO ACT IS UNCONSTITUTIONALLY VAGUE AND THE APPLICATION THEREOF IS VIOLATIVE OF DUE PROCESS

In *Mocco,* petitioner contends that the New Jersey RICO statute, and particularly its provision for "pattern of racketeering activity," is unconstitutionally vague as it does not adequately specify the proscribed conduct. This issue came before the New Jersey Supreme Court for the first time in *Mocco,* as the case represented the first criminal prosecution under the state RICO statute.

In *Mocco,* the Appellate Division concluded that defendants had not demonstrated that the statute's definition of "pattern" failed to put them on notice that their behavior constituted a pattern of racketeering activity under RICO. 632 *A.*2d at 1246. The New Jersey Supreme Court agreed with the Appellate Division and concluded that the term "pattern of racketeering activity" is not unconstitutionally vague. *State v. Ball,* 661 *A.*2d at 265.

The void-for-vagueness doctrine recognizes that a law must be clear

enough to provide fair notice of what is forbidden. *Matter of C.V.S. Pharmacy Wayne,* 116 *N.J.* 490, 500 (1989), *cert. denied sub nom., Consumer Value Stores v. Board of Pharmacy of New Jersey,* 493 *U.S.* 1045, 110 *S.Ct.* 841, 107 *L.Ed.* 2d 836 (1990). The test of vagueness is whether or not the law is so vague that a reasonable person could not reasonably understand that his conduct is prohibited. *Palmer v. City of Euclid,* 402 *U.S.* 544, 545, 91 *S.Ct.* 1563, 29 *L.E.*2d 98, 100 (1971).

The United States Supreme Court has not squarely confronted a RICO "vagueness" challenge. *State v. Ball,* 141 *N.J.* at 170, 661 *A.*2d at 265. Vagueness challenges to RICO statutes have, however, been rejected by every circuit to consider the issue. *United States v. Dischner,* 974 *F.*2d 1502, 1508 (9th Cir. 1992), cert. denied, __*U.S.*__, 113 *S.Ct.* 1290, 122 *L.Ed.*2d 682 (1993).

In rejecting the vagueness challenge by the petitioner, the New Jersey Supreme Court in the case *sub judice* stated:

> The statute makes clear that when certain conduct that the Legislature has already made criminal is committed in a certain way with a certain purpose, it will carry an enhanced penalty. The term is also not vague as applied to defendants. Any person of ordinary intelligence would realize that defendants' activities constituted conduct that the law proscribed. 661 *A.*2d 251, at 265 to 266.

The Appellate Division in *Mocco* compared the New Jersey State RICO statute with the Federal RICO law, and this comparison is essential. Under Federal RICO, 18 *U.S.C.A.* Sec. 1961(5) provides:

> "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior set of racketeering activity.

Pursuant to the New Jersey RICO statute, *N.J.S.A.* 2C:41-1d(1) and (2), the "pattern" element has two parts. It requires:

> (1) Engaging in at least two incidents of racketeering conduct one of which shall have occurred after the effective date of the act and the last of which shall have occurred within 10 years... after a prior incident of racketeering activity; and
> (2) A showing that the incidents of racketeering activity embrace criminal conduct that has either the same or similar purposes, results, participants or victims or methods of commission or are otherwise interrelated by distinguishing characteristics and are not isolated incidents.

The Appellate Division stated that there have been a multitude of "vagueness" challenges with respect to Federal RICO, and federal courts have consistently concluded that RICO passes constitutional muster. 632 *A.*2d at 1245.

While the United States Supreme Court has not squarely confronted a RICO "vagueness" challenge, it has addressed tangential issues. In *Fort Wayne Books, Inc. v. Indiana,* 489 *U.S.* 46, 58, 109 *S.Ct.* 916, 924-25, 103 *L.Ed.*2d 34, 48 (1989), the Court found that the Indiana RICO Act was not vague as applied in the context of the defendants' obscenity predicate offenses. The Supreme Court in *H.J. Inc. v. Northwestern Bell Tel. Co.,* 492 *U.S.* 229, 235 n. 2, 109 *S.Ct.* 2893, 2898 n. 2,, 106, *L.Ed.*2d 195, 206 n. 2 (1989), ruled that the Federal RICO "pattern" element was not unconditionally vague. In so doing, it also held that the "pattern" requirement would be met by a showing that the predicate racketeering offenses were related, and that they "amount to, or that they otherwise constitute a threat of, continuing racketeering activity." *Id.* at 239, 109 *S.Ct.* at 2900, 106 *L.Ed.*2d at 208. Thus evolved the "relationship plus continuity" test.

The Appellate Division in *Mocco* also addressed the vagueness issue by analyzing the allegedly ambiguous terms in context of the subject case. A defendant must establish that the statute could not reasonably be applied to his own conduct. This is the "as-applied" analysis. *See Maynard v. Cartwright,* 486 *U.S.* 356, 361, 108 *S.Ct.* 1853, 1857-58, 100 *L.Ed.*2d 372, 280 (1988) (vagueness challenges which do not implicate first amendment rights may be judged on an "as-applied" basis).

The Appellate Division cited the First Circuit's use of the "as-applied" analysis to reject the notion that RICO's "pattern" requirement was unconstitutionally vague under the specific facts presented. In *United States v. Angiulo,* 897 *F.*2d 1169, 1179-80 (1st Cir. 1990), cert. denied, 498 *U.S.* 845, 111 *S.Ct.* 130, 112 *L.Ed.*2d 98 (1990), defendants were convicted of participating in loansharking and other illegal activities of an organized crime family. *Id.* at 1179. The court stated the relevant test for constitutionality as follows:

> [F]or defendants' vagueness challenge to succeed, they must demonstrate that the meaning and scope of RICO's "pattern" element was unclear and vague as to *their* conduct at issue *here.* Phrased another way, they must show that persons of ordinary intelligence in their situation would not have had adequate notice that the gambling, loansharking and conspiracy offenses at issue here constituted a "pattern of racketeering activity" under RICO, 897 *F.*2d at 1179.

The Appellate Division in *Mocco* concluded that, "Thus, even if one

accepted the argument that New Jersey RICO may be constitutionally vague in some marginal situations, the facts in this case do not present such a situation." 632 *A.*2d at 1246.

The New Jersey Supreme Court, while concluding that "some degree of continuity, or threat of continuity, is required" found that this requirement "is inherent in the 'relatedness' element of the 'pattern of racketeering activity.' " 661 *A.*2d at 264. The Court, however, ignored the continuity requirement which, petitioner submits, exists at the federal level. *See United States v. Dean,* 647 *F.*2d 779, 791-92 (8th Cir. 1981), *reh'q on other grounds,* 667 *F.*2d 729 (8th Cir.), *cert. denied,* 456 *U.S.* 1006, 102 *S.Ct.* 2296, 73 *L.Ed.*2d 1300 (1982); *United States v. Anderson,* 626 *F.*2d 1358, 1367 n. 16 (8th Cir. 1980), *cert. denied,* 450 *U.S.* 912, 101 *S.Ct.* 1351, 67 *L.Ed.*2d 336 (1981); *United States v. Weisman,* 624 *F.*2d 1118, 1122 n. 3 (2d Cir.), *cert. denied,* 449 *U.S.* 871, 101 *S.Ct.* 209, 66 *L.Ed.*2d 91 (1980); *United States v. Campanale,* 518 *F.*2d 352, 363 n. 32 (9th Cir. 1975), *cert. denied*, 423 *U.S.* 1050, 96 *S.Ct.* 77, 46 *L.Ed.*2d 638 (1976); *United States v. DePalma,* 461 *F.Supp.* 778, 783 n. 6 (S.D.N.Y. 1978).

The incompleteness of the federal definition of RICO has long been recognized (*Philadelphia Reserve Supply v. Nowalk & Associates,* 864 *F.Supp.* 1456 (E.D. Pa. 1994)), and has led to two judicial clarifications by this Court as to the meaning of "pattern." First, in *Sedima, S.P.R.L v. Imrex Co.,* 473 *U.S.* 479, 496 n. 14, 105 *S.Ct.* 3275, 3285 n. 14, 87 *L.Ed.*2d 346 (1985), this Court held that the acts that make up the racketeering activity must be related. Second, this Court has held that for a pattern to exist there must be "continuity," since Congress' clear legislative intent was to attack continued criminal activity. *H.J. Inc. v. Northwestern Bell Telephone Co.,* 492 *U.S.* 229, 239, 109 *S.Ct.* 2900-01 (1989).

The New Jersey Supreme Court found that the factor of "continuity," as acknowledged by the Supreme Court in *H.J. Inc.,* may itself be established by evidence that overlaps the evidence establishing "relatedness." 661 *A.*2d at 264, citing *H.J. Inc.,* 492 *U.S.* at 239, 109 *S.Ct.* at 2900, 106 *L.Ed.*2d at 208. The State Supreme Court cited *United States v. Zauber,* 857 *F.*2d 137 (3d Cir. 1988), *cert. denied,* 489 *U.S.* 1066, 109 *S.Ct.* 1340, 103 *L.Ed.*2d 810 (1989), which stated:

> [a] combination of specific factors, "such as the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity" could be considered in determining whether a pattern existed. [857 *F.*2d at 149].

The New Jersey Supreme Court explained that:

> An understanding of "relatedness" based on a totality of circumstances is compatible with the statutory definition that enumerates several factors—purposes, results, participants, victims and methods and other characteristics—that may combine or be "otherwise interrelated" to establish a pattern from the "incidents" of racketeering activity" that in any event may not be "isolated." *N.J.S.A.* 2C:41-1d(2); 661 *A.*2d at 264.

The New Jersey Supreme Court concluded:

> In the most likely setting, predicate incidents of racketeering conduct will occur sequentially over a period of time. New Jersey's legislative discussions, unlike Congress', do not indicate a concern for reaching only long-term criminal activity. But short-term criminal activity, to be covered, must encompass incidents of criminal conduct that are not disconnected or isolated. Incidents of racketeering that occur sequentially, to overcome any inference that they are totally disconnected or isolated, must exhibit some temporal connection or continuity over time.
>
> Accordingly, we conclude that the primary criterion of New Jersey's "pattern of racketeering activity" is "relatedness." That calls for the application of a broad standard involving the totality of all relevant circumstances, which may include "continuity." 661 *A.*2d at 264-65.

Petitioner submits that there are several problems with the reasoning of the New Jersey State Supreme Court. The New Jersey RICO statute states that a "pattern . . . requires . . ." instead of stating that a "pattern . . . means . . .," leaving open the possibility that additional elements besides those stated in the statute could be necessary for a "pattern" to exist. New Jersey RICO, as in the federal RICO definition, uses the word "means" for several of its definitions, but for "pattern of racketeering activity" only does it use "requires." Compare 18 *U.S.C.* Section 1961 with N.J. Rev. Stat. Section 2C:41-1; see also *Sedima, supra,* 473 *U.S.* at 496 n. 14, 15 *S.Ct.* at 3285 n. 14 (noting that the use of "requires" instead of "means" indicates that the definition of "pattern" was not complete).

Another problem with the New Jersey Supreme Court's conclusion is that a definition of pattern which contained the relationship element was available elsewhere in the Organized Crime Control Act of 1970 ("Act") which contained federal RICO. See Pub. L. No. 91-452 tit. X, Sec. 1001(a), Section 357(e), 84 Stat. 922, 949-50 (1970) (codified at 18 *U.S.C.* Section 3575(e) repealed effective 1986). *See also United States*

v. Stofsky, 409 *F.Supp.* 609, 614 (S.D.N.Y. 1973) (applying the pattern definition of Section 3575(e) to federal RICO). As explained in *Philadelphia Supply, supra,* a comparison of that definition and the definition in New Jersey RICO reveals that the legislature probably drew its language from that section of the Organized Crime Control Act of 1970. Compare 18 *U.S.C.* Section 3575(e) (repealed effective 1986) ("criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events") with N.J. Rev. Stat. Section 2C:41-1(d)(2).

In contrast, the continuity element was not defined anywhere in the Organized Crime Control Act of 1970. In addition, the continuity element only received brief mention in federal cases prior to the passage of New Jersey RICO. Accordingly, the New Jersey legislature arguably did not include a continuity element in the definition of "pattern" simply because such an element was not on the legal horizon, not because the legislaure explicitly rejected such an element. *Philadelphia Reserve, supra,* 864 *F.Supp.* at 1464.

Finally, the purposes of the Organized Crime Control Act of 1970 of which federal RICO was a part, does not limit federal RICO to "long term" criminal activities any more than the purpose section of New Jersey RICO limits New Jersey RICO in this manner. Pub.L.No. 91-452, 84 Stat. 922, 922-23 (1970). Federal courts have instead gone to the legislative history of federal RICO to find the continued criminal activity concern. *See, e.g., Northwestern Bell, supra,* 492 *U.S.* at 239, 109 *S.Ct.* at 2900-01; *Sedima, supra,* 473 *U.S.* at 496 n. 14, 105 *S.Ct.* at 3285 n. 14.

Petitioner submits that the correct interpretation of the New Jersey RICO statute is that the legislature did not intend for the statutory definition of pattern to be complete. Instead, it is submitted that the correct interpretation of the statute is that the legislature left open the possibility that elements other than those stated in the statute would be required for a "pattern" to exist. This position is supported by the use of the word "requires" and by the availability of relationship language but not continuity language in a definition of "pattern" elsewhere in the Organized Crime Control Act of 1970.

Petitioner submits that his conviction under the State RICO statute must be reversed, and submits that the taint which invariably resulted from his unconstitutional conviction under the State RICO mandates a reversal of each of his convictions.

POINT III. THE RICO CONSPIRACY CONVICTION OF PETITIONER MUST BE REVERSED AS THE PROOF

FAILED TO ESTABLISH THE PETITIONER'S INVOLVEMENT WITH OR KNOWLEDGE OF, A RICO ENTERPRISE AND THE EVIDENCE FAILED TO ESTABLISH A PATTERN OF RACKETEERING ACTIVITY.

The gravaman of a RICO violation, frequently referred to as "racketeering," is the involvement in the affairs of an enterprise through a pattern of racketeering activity. *State v. Ball,* 661 *A.*2d at 257. The New Jersey RICO Act prohibits predicate acts (enumerated Federal and State crime) which form a pattern of racketeering activity carried on by an enterprise engaged in commerce. Pursuant to *N.J.S.A.* 2C:41-2c, the State must prove the following five elements in a substantive RICO offense: (1) the existence of an enterprise; (2) that the enterprise engaged in or its activities affected trade or commerce; (3) that defendant was employed by, or associated with the enterprise; (4) that he or she participated in the conduct of the affairs of the enterprise; and (5) that he or she participated through a pattern of racketeering activity.

In order to prove a conspiracy to violate RICO under *N.J.S.A.* 2C:41-2d, the State must present evidence that defendant agreed to participate directly or indirectly in the conduct of the affairs of the enterprise by agreeing to commit, or to aid other members of the conspiracy to commit, at least two racketeering acts (*N.J.S.A.* 2C:41-1a(1) and (2); *N.J.S.A.* 2C:41-1d(1)), and that he or she acted knowingly and purposely with knowledge of the unlawful objective of the conspiracy and with the intent to further its unlawful objective.

Petitioner submits that giving the State the benefit of all inferences reasonably drawn from the evidence, viewed in a light most favorable to the prosecution, there was no evidence to demonstrate the petitioner's involvement with, or even knowledge of, the extensive, broad reaching enterprise that was charged. The trial proofs were devoid of any *indicia* of petitioner Mocco's involvement in 1) the HMDC Balefill facility; 2) the Newark dumping site; 3) the passing of forged checks at Valley National Bank; and/or 4) the mailing and/or wiring of monies to Palm Beach, Florida.

The State claimed that the expense records maintained by the CMB enterprise referred to petitioner and the other town officials. (35T36-37; 35T41-42; 37T17-2 to 22-12). More specifically, the State alleged that Joseph Dulanie was the "chief," that Joseph Mocco was "the big guy," and that George Hurtuk was "the fat guy." (Aa1-71). Once again, giving the prosecution the benefit of all reasonable inferences, the expense records only proved entries referring to these nicknames for a time period from the end of January to June 7, 1986. Thus, the evidence failed to establish a RICO enterprise and failed to show beyond a rea-

sonable doubt that the petitioner knowingly conspired to patrticipate in the alleged RICO enterprise and/or for a "legally" sufficient time period.

Since the State failed to prove the elements necessary to substantiate a RICO conspiracy beyond a reasonable doubt, a reversal is necessary. As there was insufficient evidence to support this conviction, there was harmful error regarding the trial judge's instructions on this charge. (104T73-22; 104T86-19 to 92-8). Petitioner submits that this error tainted all of the convictions mandating a reversal of each conviction.

POINT IV. THE GOVERNMENT'S PLEADINGS WERE WOEFULLY DEFICIENT AS TO THE PLEADING REQUIREMENTS OF THE CRIMINAL RICO VIOLATIONS SET FORTH IN THE INDICTMENT AND FAILED TO SET FORTH THE NECESSARY ELEMENTS OF A RICO CONSPIRACY; THE STATE FAILED TO ESTABLISH PETITIONER'S AWARENESS OF THE SCOPE OF THE ENTERPRISE AND FAILED TO PROVE A PATTERN OF RACKETEERING ACTIVITY.

In order to sustain a conviction under Count One of the Indictment, the State was required to prove the following elements beyond any and all reasonable doubt: 1) a conspiracy, 2) an enterprise, 3) acts in furtherance of the conspiracy, 4) a pattern of these acts, 5) use of the mails or wires to conduct the pattern and affect interstate commerce, 6) threatened continuity of this pattern and 7) a minimum number of incidents to substantiate the same. *N.J.S.A.* 2C:41-1 *et seq.*

In addition, the Government had to prove that the petitioner and other defendants agreed to participate directly or indirectly in the conduct of the affairs of the enterprise as charged, by agreeing to commit, aid or abet members of the conspiracy in the commission of two or more incidents of racketeering and that the defendants in all of those instances acted with the requisite level of culpability, i.e., purposely and with the awareness of the existence of the enterprise as charged, having conscious objective to further the enterprise's goal pursuant to the commission of RICO acts. Thus, the individual would have to have purposely or consciously intended or agreed to participate in the affairs of the enterprise and to participate in the enterprise's affairs through a pattern of racketeering activity.

Petitioner was acquitted of the substantive RICO charge (racketeering), but convicted of the conspiracy count. In order to form the requisite intent for conspiracy one must also have been aware of the enterprise's scope, as well as its activities. *United States v. Hooker,* 841 *F.*2d 1225, 1227 (4th Cir. 1988). Moreover, where a RICO conviction is pred-

icated upon multiple racketeering acts, the conviction cannot stand where the evidence of the existence of the underlying acts is legally insufficient and the court is unable to determine whether the act formed the basis for the conviction. *United States v. Vastola,* 899 *F.*2d 211, 228 (3rd Cir. 1990). The acts committed must have been proved to have been done under the auspices of the enterprise. *Id.* at 229.

In *Hooker, supra,* the Court of Appeals for the Fourth Circuit reversed a RICO conspiracy conviction that had been returned by the jury. The Court found that that Count of the indictment was defective, insofar as it failed to allege an essential element of the charge, namely, the effect on interstate commerce. The Court held that this defect could not be cured by citing the RICO statute in the indictment. It also was not cured by the fact that the defendant had actual notice of the nature of the offense.

As a general principle, in order to sustain a conviction for conspiracy, pursuant to RICO, the State must demonstrate that each of the defendants was aware of the existence of the enterprise, that each understood the scope of the enterprise, the activities in general, and that each must have agreed to associate himself with the enterprise. *United States v. Diecidue,* 603 *F.*2d 535, 555-57 (5th Cir. 1979); *United States v. Vastola, supra,* at 229.

Petitioner submits that mere assent to the commission of the predicate offense is insufficient. *United States v. Vatola, supra,* at 229. Although the petitioner need not have been shown to know all of the enterprise's details or even the identity of all of the alleged co-conspirators, they must have been shown to have understood the general nature of the RICO enterprise and its activities. They must also have purposely intended to participate in the conduct of the enterprise through its affairs. In essence, there must have been a unity of purpose, and a shared common goal of unlawful objective, which in this instance would be the violation of the RICO statutes.

Pursuant to the correlating federal statute (18 *U.S.C.* Sec. 1962) federal courts have reversed RICO conspiracy convictions where the government's proofs have failed to establish a particular defendant's knowledge of, or embracement of the scope of the particular enterprise and where the trial court improperly permitted the matter to be decided by the jury. *See United States v. Deceideu, supra. Deceideu* involved the prosecution of thirteen defendants charged under a twelve count indictment for conspiracy of substantive crimes under RICO. Six of the defendants were convicted in almost every count and the convictions of three of the defendants were reversed. As to a specific defendant, Boni, the Court based the reversal partly upon the Government's failure to prove that Boni had any knowledge about his purported co-defendants'

related acts:

> There is no evidence upon which to find that Boni knew the enterprises were engaged in contract murders, a proven purpose of the enterprise, or that dealing in drugs was part of that enterprise's activity. It is not even contended that Boni had any knowledge about the armed robberies, distribution of counterfeit currency, or stolen treasury bills. Without evidence that Boni knew something about his co-defendants, related activities which made the enterprise, he could not be convicted of conspiring to engage in a pattern of racketeering as defined by the Statute. *Id.* at 556.

Standard proofs necessary to sustain a conviction of conspiracy to violate the RICO statutes differ from the proofs necessary to sustain a conviction for conspiracy. It follows that a distinction must be made in the proof required for the commission of the predicate offenses for each alleged offense by a co-conspirator. See *N.J.S.A.* 2C:41-2(d) and *N.J.S.A.* 2C:5-2. See also, *United States v. Local 560*, 581 *F.Supp.* 279, 332 (D.C.N.J. 1984).

While "knowing" conduct may suffice for the commission of racketeering acts (RICO), membership in a racketeering conspiracy requires purpose of mind, i.e., the defendant must be aware of the scope of the enterprise as alleged.

In *United States v. Neapolitan,* 791 *F.*2d 495 (7th Cir. 1986), the Court held:

> When the Government attempts to link multiple defendants or multiple conspiracies through the device of Section 1962 (d) [Federal RICO Statute to N.J.S.A. 2C:41-2(d)] the indictment must prove conspiratorial agreement had, as its overall objective, the violation of RICO. *Id.* at 499, footnote 5.

In the case *sub judice,* the State was required to show that the petitioner and other defendants had agreed to conduct the affairs of the enterprise, the interstate and statewide enterprise as charged through a pattern of racketeering. *Neapolitan, supra,* at 499. This would also have required proof that the petitioner and defendants understood the scope of the alleged enterprise and had agreed to further its affairs by committing the racketeering acts. *United States v. Riccobene,* 709 *F.*2d 214, 224-25 (3d Cir.) *cert. denied sub nom., Ciancaglini v. United States,* 464 *U.S.* 849, 104 *S.Ct.* 157, 78 *L.Ed.*2d 145 (1983) (construing parallel provision of Federal RICO).

Petitioner submits that the State would have been required to prove that the petitioner and defendants purposely joined in a conspiracy

which had as its goal the commission of the substantive RICO offenses: *Id.* at 225; *see United States v. Sutherland,* 656 *F.*2d 1181, 1191-93 (5th Cir. 1981), *cert. den.* 445 *U.S.* 949 (1982).

The State at trial proceeded upon the theory of an enterprise. That enterprise was alleged to have been involved in dumping at the HMDC Balefill facility in Newark, New Jersey, in money laundering through a bank in Passaic and in the investment of profits of the enterprise through persons and financial institutions located in West Palm Beach, Florida. In pursuing a conviction of the petitioner and defendants for conspiracy, the State introduced or produced insufficient evidence to support a conspiracy conviction under the standard as set forth above. There was no evidence produced to link the petitioner's agreement to paticipate in any such grandiose interstate enterprise, as alleged.

Petitioner submits that in light of these deficient proofs, it is apparent that the State attempted, with the indictment and trial, to link multiple defendants in allegations as to an alleged multiple conspiracy without any evidence as to any single racketeering, conspiratorial agreement. To compound this further, the State appears to have attempted to back into a conspiracy conviction by charging substantive RICO violations and by charging conspiracy in the expectation that even if the State were to fail in obtaining a conviction for substantive RICO violations the charge of conspiracy for the same might stand. The State appears to have drafted pleadings, largely creating circumstantial evidence setting forth sketchy elements of the alleged RICO conspiracy and RICO violations in the expectation that should the conviction for a substantive RICO violation fail, there might still be a conviction as to conspiracy.

The State Appellate Division rejected this argument, and distinguished *Diecidue. Ball, supra,* 632 *A.*2d at 1255. The Court stated: "It can be inferred from the State's evidence that defendants were familiar with dumping operations in North Bergen, managed by Bassi and Harvan, and were aware that the enterprise they agreed to join was in the business of illegally disposing of out-of-state solid waste for profit." 632 *A.*2d at 1255-56. The State Supreme Court concurred. 661 *A.*2d at 270.

Petitioner submits that the State failed to prove the necessary elements of a RICO conspiracy, mandating a reversal of his conviction on this Count (and the other counts due to taint).

POINT V. THE STATE FAILED TO DEMONSTRATE OR PROVE THE EXISTENCE OF AN ONGOING ENTERPRISE INDEPENDENT FROM THE ALLEGED RACKETEERING ACTS.

In the case *sub judice,* the State failed to proved the required elements of the existence of an enterprise beyond a reasonable doubt. The State failed to demonstrate a structure independent from the alleged racketeering acts, and failed to demonstrate the requisite "continuity plus relationship." The acts which the State may have proven at trial did not extend over a sufficient period of time, i.e., as mandated by the decision in *H.J. Inc. v. Northwestern Bell, supra.*

The acquittal of petitioner on the racketeering acts as predicate acts demonstrates the Government's failure in proving the case for conspiracy based on those predicate acts.

The Appellate Division rejected this argument. 632 *A.*2d at 1240, and the State Supreme Court did, as well. 661 *A.*2d at 271.

For the foregoing reasons, petitioner submits that his conviction under the state RICO count must be reversed, and submits that all of his convictions should be reversed due to the taint from the unconstitutional jury charge regarding RICO.

POINT VI. THE TRIAL COURT ERRED WHEN IT INSTRUCTED THE JURY AS TO THE CONSPIRACY TO COMMIT RACKETEERING ACTS WHERE THE PROOFS WERE INSUFFICIENT TO SUBSTANTIATE THE SAME REQUIRING REVERSAL OF THE PETITIONER'S CONVICTION.

In the case *sub judice,* the jury instructions were essential to the proper defense of the matter. The RICO jury charges should have included instructions on whether a pattern had been established, whether an enterprise had been proved and whether the necessary nexus between the enterprise, the predicate acts alleged and the defendants had been established. The jury should have understood after the Court had finished its charges that it was called on to determine much more than whether a defendant committed the predicate acts charged since, as to the predicate acts themselves, the charges to the jury must have clearly set out each and every element of the crimes alleged.

It was the judge's duty in the face of conspiracies that could be inferred from the evidence offered to minimize the threat of prejudicial "spillover" by charging the jury concerning multiple conspiracies. The judge failed to so instruct the jury and by instructing the jury as to the elements of a conspiracy in the face of insufficient evidence as to the same, permitted the jury to focus on the evidence against the defendants without determining whether or not the conspiracy as charged actually existed. The jury appeared to distinguish between the commission of the predicate acts by acquitting the defendants of unlawful participation in the alleged criminal enterprise. In the face of the acquittal

as to the predicate acts of racketeering, the petitioner could not have justifiably been convicted of conspiracy.

The trial evidence failed to show the petitioner was either a member of the conspiracy charged or was "employed by and associated with" the alleged enterprise. The trial proofs also failed to establish the existence of the grandiose enterprise charged in both the conspiracy and substantive racketeering counts as set forth at length above. What is more crucial is the fact that the trial proofs contradicted the State's theory that the predicate incidents of racketeering alleged to constitute the pattern of "racketeering activity" were conducted through the "enterprise" as required, pursuant to the RICO statute.

In fact, the evidence adduced at trial indicated that many, if not most of the predicate acts were undertaken not only outside, but in derogation of the charged enterprise. For example, it is both factually unsupportable and theoretically absurd for the State to contend that the incidents of racketeering chargeable against petitioner Mocco and related to Patrick Ball's attempt to open up a dumping operation on his own in North Bergen, and cutting out Harvan and Bassi, made a part of the pattern of racketeering allegedly conducted through the enterprise charged in Counts One and Two. If anything, as stated above, these alleged incidents of racketeering were in direct derogation of the enterprise charged in Counts One and Two, which Harvan and Bassi had as its nucleus. The wide-ranging dumping scheme alleged in the indictment, a scheme allegedly headed by Bassi and Harvan in North Bergen, Newark and at the HMDC Balefill, ipso facto, any separate scheme by Ball to open his own dump site in competition with Harvan and Bassi could not be part of the same enterprise.

It is well-settled that where a single conspiracy is charged in the indictment that the evidence shows one different from that charged for multiple conspiracies, there is a failure of proofs. *Kotteakos v. United States,* 328 *U.S.* 750, 66 *S.Ct.* 1239 (1946). Additionally, contrary to what the State contended, the New Jersey RICO statutes were not intended to and did not charge the substantive law of conspiracy which holds that criminal liability may not be based upon evidence of multiple conspiracies where a single conspiracy is charged.

In the case *sub judice,* the State chose to draft and submit to a grand jury a wide ranging racketeering conspiracy and substantive racketeering violations featuring the HMDC Balefill, money laundering in Florida and dumping in Newark. There is not a shred of evidence that petitioner Mocco knew of, authorized or adopted these alleged "subsidiary transactions" of the conspiracy and the enterprise. Hence, this Court must find that there is a fatal variance in the case herein, because each of the defendants could not have agreed to the wide ranging con-

spiracy and substantive RICO offenses charged and returned in the indictment.

POINT VII. THE TRIAL ERRED IN PERMITTING THE ADMISSION OF THE HEARSAY STATEMENT MADE BY JOSEPH LOMUSCIO

During the *Mocco* trial, the State was permitted to admit, over strenuous objection, the testimony of a State's witness, Vincent Granieri, as to a hearsay statement made by one Joseph Lomuscio. (67T1-1 to 35-11).

The testimony of Vincent Ganieri, who was engaged in a landfill business, was that he had a chance meeting with Joseph Lomuscio (then a North Bergen Township employee paid the salary of $1.00 per year, with no benefits, hospitalization, pension or other emoluments), who allegedly made an offer to Granieri to "take over the job" and "we can make some money." Lomuscio (who was indicted, but has not been tried by the State as of this date) allegedly indicated to Granieri that this was a message from Joseph Mocco. (67T57-17 to 59-6).

The State sought to admit the hearsay statement on the basis that it was evidence on the continuing ongoing conspiratorial agreement as charged in the indictment. Petitioner vehemently objected to its admission. (67T1-1 to 67T35-11).

It is significant to know that Granieri claimed that he rejected the alleged proposal and that there was no evidence that it was ever mentiond again after the "chance meeting." (67T352, 1-10).

The State in *Mocco* did not introduce any evidence tending to show that the alleged hearsay conversation in question between Granieri and Lomuscio was made in order to further the purposes of the charged conspiracy between Mocco and Joseph Lomuscio as set forth in Count One of the indictment. It should also be noted that there was extremely slim evidence in the case against Mocco and that the entire case against him was circumstantial and extremely thin. There were no witnesses who had testified that they had given Mocco money; there were no video tapes showing that he had received money or was on the scene where money was given; there were no wiretaps played where money was discussed with Mocco; Mocco was never seen in the company of any person when a bribe was given; there were no telephone calls to Mocco by any of the bribe givers; and neither his name or his telephone number was ever in the telephone records and phone logbooks seized during the search of the bribe givers. In fact, Mocco was never seen at a dump site or seen in the company of any dumper. This hearsay statement became the State's greatest piece of evidence and the State's "smoking gun" in the trial. The judge acknowledged that the matter was

"a close call," yet he permitted the evidence to go in despite the fact that the testimony was clearly inadmissible.

Petitioner submits that these statements made by Granieri consisted of hearsay statements alleged uttered by Lomuscio, and are not admissible under any exception to the hearsay rule and are violative of petition's sixth amendment confrontation rights and due process right to a fair trial.

POINT VIII. THE JURY IN THE TRIAL WAS TAINTED, AND THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR A MISTRIAL, AND THE POST-TRIAL MOTIONS INTERVIEWING JURORS MICHAEL BIONDO AND RAYMOND GRAVES REPRESENTS REVERSIBLE ERROR.

On or about March 3, 1989, the trial court became aware that outside attempts had been made to influence the role of a particular juror, Michael Biondo. The alleged attempt was claimed to have been made during the Court's luncheon recess on Friday, March 10, 1989. This was ultimately reported to the Hudson County Prosecutor's Office and to the court on or about Monday, March 13, 1989. Mr. Biondo described the incident (92T74-14 to 85-11). He stated that an individual by the name of Jeffrey Zak had approached him and had requested that he give one of the defendants a "fair shake." Mr. Biondo also alleged that Zak had indicated that he could be helpful to Biondo through his real estate connections if Biondo ever needed that assistance.

The Court conducted an *in camera* interview to determine whether or not in light of the incident, Biondo should remain as a juror. (93T1-1 to 14-11). Ultimately, he was discharged. Throughout the course of the *in camera* interview, the Court inquired as to whether or not Biondo told any of the other jurors about the incident. Biondo indicated that he had not. (92T89-18 to 91-1). However, Biondo admitted that he was upset, slammed the door in the jury room, but claimed that there were no other jurors witness to that incident. (92T). Subsequently, however, it became apparent that Biondo had an outburst in the presence of not less than five other jurors. (92T85-13 to 86-2). The fact that the outburst was witnessed by others was related by a court officer, Monica Keenan, on or about March 15, 1989. (94T33-4 to 14). Keenan represented that Biondo had slammed the door and uttered comments to the effect, "Don't trust the lawyers." Officer Keenan stated that that comment was made in the presence of the four or five aforementioned jurors. (92T85-13 to 86-2). No one can tell us what was said to the jurors by Biondo once the door slammed shut on Officer Keenan.

Defense counsel, upon learning of the initial incident, moved for mis-

trial. (94T43-4 to 47-24). Motions for a new trial were made, post-verdict, based upon the added revelations. The motions were all denied. However, the Court did state the following to juror Biondo in chambers, "Yes. Biondo, I haven't yet decided about excusing you. I'll tell you, frankly, I'm leaning that way, but Counsel want to be heard on that subject, so I have to hear them first before making a decision. If I do, I'd feel rather badly about it because you've put in the time and you've been here and you've been anxious and a good juror." (94T89-10 to 16). The judge said this after it was apparent the juror had lied. Ultimately, juror Biondo was excused and the trial continued.

Petitioner submits that this seemingly innocuous statement by the Court representing juror Biondo as a "fine juror" in spite of and in the face of juror misconduct represented not just juror taint, but also judicial prejudice, which should have disqualified Judge Humphreys from sitting in this matter. Judge Humphreys sanitized the juror and tainted that trial, depriving Mocco of a fair trial.

The Biondo incident constitutes a showing of juror taint, entitling petitioner to a new trial. These incidents, when considered in the light of the post-trial revelations, indicate that this jury which had sat for a period of about 7 months was tainted. The implications and extent of these incidents became clearer when attorney for co-defendant, George Hurtuk, filed a motion to interview discharged juror, Biondo. (Aa675-676). The request was based upon information provided to counsel regarding the alleged attempt to influence Biondo. That information, which was later supplied to counsel, had not been made available during the trial, because of the pendency of a prosecutorial investigation of Mr. Biondo. Counsel was provided with transcripts of statements made by both Biondo and Robert Byrne, Biondo's friend and Municipal Clerk for the City of Jersey City.

The contents of Biondo's statements indicate that he had withheld information not only at the time of jury selection, but also during his *in camera* interview with Judge Humphreys (92T4-9 to 85-9). The information withheld during jury selection deprived the petitioner of his right to a peremptory challenge.

The post-trial information gleaned from the Grand Jury testimony in statements made during the State investigation into the alleged incident regarding juror Biondo demonstrated the following:

1. There was a meeting between Jeffrey Zak and Juror Biondo;

2. Biondo was aware that Zak was employed by Peter Mocco. Mr. Mocco was on the witness list presented to Mr. Biondo at the time of jury selection.

3. The employment records of Sue Ann Biondo reveal that she had filed an application for employment with the City of Jersey City on or

about September 2, 1988.

4. During jury selection, Juror Biondo indicated that his wife was a housewife.

5. Biondo informed Zak that he was selected to serve on the jury. During an encounter on or about September, 1988, Zak, according to Biondo, stated to Biondo, "Let them go, they're all good guys."

6. Michael Biondo and Robert Byrne are friends.

7. Byrne told Biondo that he had been asked what, if anything, he wanted to do about jury tampering.

8. At the alleged meeting of March 13, 1989, Biondo searched Jeffrey Zak in order to ascertain whether or not Mr. Zak was wearing any wire or recording device and stated that he did this in order to, "cover his own rear end."

9. According to sworn Grand Jury testimony of Jeffrey Zak, Biondo offered to help Zak with jury deliberations.

10. Biondo held a knife to Jeffrey Zak and threatened him.

11. Biondo told Zak, "Don't worry about it, I'm going to say nothing." During the weekend between the Friday of the alleged encounter and the Monday of the incident report to the Hudson County prosecutor's office and to the court, Biondo discussed the alleged incident with more than one person, including City Clerk Robert Byrne.

12. Zak denied acting on anyone's behalf.

The above facts were provided to the trial court on the new trial motion. These statements, incidents and sworn Grand Jury testimony set forth a very disturbing image of Michael Biondo's service as a juror at this trial for a six month period. (117T, 118T).

Mr. Biondo misled the Court and defense counsel during the period we refer to as jury selection. Mr. Biondo had been give ample opportunity to review the witness list and was subsequently asked if he knew or recognized anyone on the witness list. In spite of Mr. Biondo's denial, it has become readily apparent that Biondo was acquainted with Jeffrey Zak and had known Mr. Zak for an extended period of time. It was equally apparent that Mr. Biondo knew of Zak's relationship to Peter Mocco, who was also named on the witness list.

Equally disturbing were the statements Mr. Biondo made regarding his wife. At the time of jury selection, Mr. Biondo indicated that Mrs. Biondo was a housewife. However, in the documents received by defense counsel subsequent to the trial and as early as September 2, 1988, Mrs. Biondo had applied for employment with the City of Jersey City. Given the nature of the trial and the individuals involved, this fact is one which should have been made available to the court and the counsel at the time Mr. Biondo was selected as a juror, especially in view of the fact that Mr. Biondo maintained a friendship with the City

Clerk Robert Byrne. It is also both logical and evident that counsel would have wanted to be provided with the opportunity to exercise a peremptory challenge as to Biondo's acceptance as a juror. Biondo misrepresented answers 10, 11, 14, 16 and 26 on the jury form.

These inconsistencies have served to create serious questions and doubts about Biondo's service as a juror. In addition, the inconsistencies combined with the inconsistency in the description of the incidents, i.e., the one Biondo relayed to the Court as opposed to Officer Keenan's version demonstrates that Mr. Biondo had, in fact, been less than frank with the Court. Mr. Biondo had claimed in his interview that he had not communicated the alleged incident to any of the jurors. (92T89-18 to 91-1). However, the Court Officer was present at the time that he entered the jury room and reported that he had slammed the door uttering in the presence of four or five jurors, "Don't trust the lawyers." The latter facts and circumstances raised the issue of jury tainting, not only as to Biondo's service as a juror and the duration of six months, but also as to whether or not he had tainted remaining jury members. (92T85-3 to 86-2).

On or about May 17, 1989, co-defendant George Hurtuk was present with a friend, Eileen Wende at the Meadowlands Racetrack, East Rutherford, New Jersey. It was approximately 10:00 p.m. and Mr. Hurtuk was approached by a former juror named Raymond Graves. On or about May 18, 1989, Mr. Hurtuk advised counsel that Mr. Graves had informed him "that there was s... going on in the jury room about the Biondo incident and lots of s..." Graves further stated, according to co-defendant Hurtuk, that Biondo had often entered the room during the trials saying, "They're all guilty." The latter statement was verified by Jeffery Zak's Grand Jury testimony wherein he stated during the encounter on March 13, 1989, "prior to defense commencing their case," that Biondo felt at the time that all the defendants were guilty. (Aa634). Mr. Hurtuk further related and later certified to the court that juror Graves had also stated at some point, "they even tried to approach me" and that the foreman of the jury wanted, "to convict you from the beginning." (Aa668-669).

These factual revelations surfacing both during and after the trial have indicated that the jury which had served on this trial for a period of about seven months was tainted. Four incidents highlight this taint:

1. Jury tampering had been conveyed by Byrne to Biondo in or about Fall, 1988.

2. The Biondo door slamming incident.

3. The Hurtuk/Graves racetrack incident and communications with Mr. Hurtuk and representations made at that encounter.

4. Sworn Grand Jury testimony of Jeffrey Zak indicating that juror

Biondo had formed a belief as to petitioner's guilt prior to the commencement of the defense's case.

Based upon these revelations, counsel requested an interview of the two jurors. The interviews were sought not for the purpose of ascertaining the processes of jury deliberations, rather they were sought for the narrow purpose of confirming or dismissing the factual assertions of these incidents. The request for the interviews was denied. (Aa675-676).

In the case *sub judice,* the trial court had conducted an *in camera* interview of juror Biondo immediately prior to discharging him as a juror. (Aa553-577). At that time, defense counsel was not aware of any of the incidents, including the door slamming incident referred to herein. While counsel recognizes the policy against interviewing jurors post-verdict, the import of these issues is relevant to a much protected right to a fair trial and impartial trial indicates that the interview of jurors Biondo and Graves should have been granted. These interviews would have disclosed whether or not the communication was prejudicial. These statements taken with the court's findings, that juror Biondo was a "fine juror" indicate not just prejudice and taint in the jury, but also the Court's bias and prejudice against petitioner.

Juror Biondo's failure to honestly and candidly respond to the inquiry posed by the Court relating to potential bias deprived the petitioner of a fair trial and his ability to exercise his rightful peremptory challenges. Juror Biondo failed to reveal to the Court that he had known an individual who worked for a potential witness in the case. Biondo also failed to disclose the fact that his wife had applied for and had perhaps accepted employment with the Jersey City Board of Education, prior to Biondo's being sworn as a juror. The latter is very significant, given the political nature of the positions held by petitioner and other co-defendants.

Whether this Court determines that the failure of juror Biondo to give a responsive and honest answer to their inquiry was a result of inadvertance or deliberate misrepresentation the fact does not alter the conclusion. Either way a new trial must be granted, whether due to actual bias or to the denial or petitioner's right to exercise his peremptory challenges as to the juror. Accordingly, Biondo's answers as to the questions asked of him in *voir dire* deprived petitioner of his peremptory challenges and a fair trial.

POINT IX. THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION TO DISQUALIFY THE TRIAL JUDGE FROM SITTING IN THIS MATTER

Counsel and the accused had reasonable cause for believing that the

Court could not be impartial toward the petitioner in the trial. There were a series of errors by the trial judge, which were of reversible magnitude. These errors reflected the judge's bias as to petitioner Joseph Mocco and the other defendants.

The trial judge, the Honorable Burrell Ives Humphreys, revealed his bias throughout the trial. As previously described, Judge Humphreys erroneously admitted the Lomuscio hearsay (on the basis of his prior knowledge of petitioner Joseph Mocco); failed to dismiss certain counts at the end of the State's case, which had no factual nexus to Joseph Mocco; failed to properly handle the incident involving juror Biondo and failed to declare a mistrial due to the juror misconduct.

As asserted in petitioner's pretrial motions, the trial judge's judicial involvement in prior, unrelated proceedings pertaining to the accused, Joseph Mocco and the trial judge's statements from the bench, touching upon Joseph Mocco and the other North Bergen officials, who could well have been and were witnesses in the case, during those proceedings, provided a reasonable basis for the petitioner to believe that he could not receive a fair and unbiased trial.

Judge Humphreys had been the sitting Judge in Hudson County Superior Court in a number of civil actions in which the Petitioner Joseph Mocco had either been named a party or a person referred to in the proceedings. In the course of the proceedings, the petitioner had been the subject of comment by the Court in its opinions rendered from the bench, subsequent to the petitioner's arrest on August 7, 1986. During the pendency of three of those civil actions, the Court had entertained applications by the State for toll billing records related to the ongoing criminal investigation by the State into the very allegations which made up the instant indictment. (Aa72-118). The toll record applications and the affidavits advised the Court that the State was investigating allegations that North Bergen governmental officials were accepting payoffs in exchange for permitting illegal dumping to go on in North Bergen. The Court had previously sat in the matters captioned, *"Joseph Mocco v. Joseph Picone,"* Docket No. L-03814-85; *KMG Main Hurdman v. Municipal Investigating* Court Opinion dated August 20, 1986, Docket No. C-2616-86; Orders and applications for toll billing records; *Joseph Mocco, Town Clerk of the Township of North Bergen v. Anthony De Vincent, Mayor of the Township of North Bergen, et al.*, Docket No. C-2382-79 and the perogative writ captioned *"De Vincent v. Mayor of North Bergen, Joseph Mocco, as Township Clerk, et al."*, Docket No. L-0899-49-86-PW and *Taffaro v. Mocco, et al.* Judge Humphreys made derogatory statements about petitioner Mocco in the course of these other cases.

The facts in this case required disqualification. It was apparent that

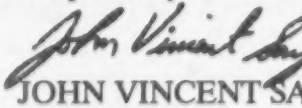
Judge Humphreys should have recused himself, given the prior involvement in other proceedings related to the petitioner, as well as his comments during the proceedings that related to the accused, to the jurors, and to individuals who were to be witnesses at trial. The ultimate question that should have been answered by the Court in the petitioner's motion for disqualification was not whether the Court believed or was convinced that it could give the accused a fair and unbiased trial. Rather, the ultimate issue was whether or not the accused had a reasonable belief that the Court might not be impartial. The trial court erred in denying petitioner's motion for disqualification. While standing alone, a given judicial decision or comment in a separate proceeding involving the accused and/or municipal officials of North Bergen might not have demonstrated the appearance of bias in and of itself, but when viewed in the aggregate and coupled with the Court's understanding of the Biondo taint situation and the court's statements reflecting that juror Biondo is a "fine juror," the bias is apparent. All of these findings formed a mosaic which created the appearance of bias against the accused. For over two and a half years dating back to the recall election litigation of 1985, the Court had acquired through prior proceedings a significant bank of information concerning the accused, the municipal affairs of North Bergen and the accused's alleged role in those municipal affairs, which, invariably influenced, consciously or unconsciously, the Court in the trial of this case.

CONCLUSION

Petitioner Joseph Mocco respectfully submits that based upon the foregoing reasons, this petition for *certiorari* should be granted. The New Jersey Supreme Court interpreted a federal question in a way that conflicts with the decisions of a United States Court of appeals, and review is warranted by this Court to clarify the split in federal circuits (and state) as to interpretation of the term "enterprise."

In addition to this important question, petitioner also submits that this petition should be granted in order for this Court to decide an important question concerning the constitutionality of the New Jersey RICO statute. Finally, petitioner submits that numerous other important questions raised in this petition justify its granting.

Respectfully submitted,



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DATED: October 11, 1995

661 A.2d 251

STATE OF NEW JERSEY PLAINTIFF, v. PATRICK BALL AND BIG APPLE LEASING CO., DEFENDANTS.

STATE OF NEW JERSEY, PLAINTIFF-RESPONDENT, v. GEORGE HURTUK, DEFENDANT-APPELLANT.

STATE OF NEW JERSEY, PLAINTIFF-RESPONDENT, v. JOSEPH DULANIE, DEFENDANT-APPELLANT.

STATE OF NEW JERSEY, PLAINTIFF-RESPONDENT, v. JOSEPH MOCCO, DEFENDANT-APPELLANT.

STATE OF NEW JERSEY, PLAINTIFF-RESPONDENT, v. RICHARD BASSI, DEFENDANT-APPELLANT.

Argued October 12, 1994—Decided July 20, 1995.

SYNOPSIS

Defendants were convicted in the Superior Court, Hudson County, Law Division, of, inter alia, violating Racketeer Influenced and Corrupt Organizations (RICO) Act and conspiring to do so in connection with scheme to dump solid waste generated in New York at unauthorized New Jersey sites. Defendants appealed. The Superior Court, Appellate Division, 268 N.J. Super. 72, 632 A.2d 1222, affirmed. Following grants of certiorari, 135 N.J. 304, 639 A.2d 304, the Supreme Court, Handler, J., held that: (1) RICO "enterprise" must have organization, but that organization need not feature ascertainable structure or structure with particular configuration; (2) some degree of continuity, or threat of continuity, is required and inherent in "relatedness" element of "pattern of racketeering activity"; (3) RICO provision for "pattern of racketeering activity" was not unconstitutionally vague on its face or as applied to defendants; (4) in order to "conduct or participate" in RICO enterprise, defendant need not have been found to have exercised responsibilities of operation or management; (5) to be convicted of conspiracy to violate RICO, defendant need not agree to commit person-

ally at least two predicate acts of racketeering; (6) there was no reversible error in jury instructions; and (7) evidence supported convictions.

Affirmed.

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1. Racketeer Influenced and Corrupt Organizations ⇨ 104, 105

Gravamen of Racketeer Influenced and Corrupt Organizations (RICO) Act violation, frequently referred to as "racketeering," is involvement in affairs of enterprise through pattern of racketeering activity. N.J.S.A. 2C:41-2.

2. Racketeer Influenced and Corrupt Organizations ⇨ 101

Although legislature came to perceive purposes and goals to be achieved by Racketeer Influenced and Corrupt Organizations (RICO) Act distinct from those of federal statutory scheme, Supreme Court heeds federal legislative history and case law in construing state statute's definition of "enterprise," as federal statute served as initial model for state statute. 18 U.S.C.A. ‡‡ 1961, 1962; N.J.S.A. 2C:41-1.

3. Racketeer Influenced and Corrupt Organizations ⇨ 104, 105

Under Racketeer Influenced and Corrupt Organizations (RICO) Act, "enterprise" is element separate from "pattern of racketeering activity," and state must prove existence of both in order to establish RICO violation; "enterprise" is association, and "pattern of racketeering activity" consists of predicate incidents, but evidence serving to establish such enterprise need not be distinct or different from proof establishing pattern of racketeering activity. N.J.S.A. 2C:41-1, 2C:41-1, subd. d, 2C:41-2, 2C:41-2, subd. c, 2C:41-6.

4. Racketeer Influenced and Corrupt Organizations ⇨ 105

Because "enterprise" under Racketeer Influenced and Corrupt Organizations (RICO) Act is distinct from incidents constituting "pattern of racketeering activity" enterprise must have "organization," which ned not feature ascertainable structure or structure with particular configuration, but rather, conssits in those kinds of interactions that become necessary when group, to accomplish its goal, divides among its members tasks that are necessary to achieve common purpose; division of labor and separation of functions undertaken by participants serve as distinguishing marks of "enterprise," as group, when it so divides and

assembles its laborers in order to acomplish its criminal purpose, must necessarily engage in high degree of planning, cooperation and coordination, thus effectively constituting itself as "organization." N.J.S.A. 2C:41-1, 2C:41-2, 2C:41-6.

5. Racketeer Influenced and Corrupt Organizations ⇨ 121

Evidence showing ascertainable structure will support inference that group engaged in carefully planned and highly coordinated criminal activity, and will therefore support conclusion that "enterprise" existed for purposes of Racketeer Influenced and Corrupt Organizations (RICO) Act. N.J.S.A. 2C:41-1, 2C:41-2, 2C:41-6.

6. Racketeer Influenced and Corrupt Organizations ⇨ 105

Apart from organization's structure as such, focus of evidence of "enterprise" under Racketeer Influenced and Corrupt Organizations (RICO) Act must be on number of people involved and their knowledge of objectives of their association, how paticipants associated with each other, whether participants each performed discrete roles in carrying out scheme, level of planning involved, how decisions were made, coordination involved in implementing decisions, how frequently group engaged in incidents or committed acts of racketeering activity, and length of time between them. N.J.S.A. 2C:41-1, 2C:41-2, 2C:41-6.

7. Racketeer Influenced and Corrupt Organizations ⇨ 104

Some degree of continuity, or threat of continuity, is required and inherent in "relatedness" element of "pattern of racketeering activity" under Racketeer Influenced and Corrupt Organizations (RICO) Act; although "continuity" is not required as distinct subelement of "pattern," primary criterion of "pattern of racketeering activity" is "relatedness," which calls for application of broad standard involving totality of all relevant circumstances, which may include "continuity." N.J.S.A. 2C:41-1, subd. d, 2C:41-2, subd. c.

8. Racketeer Influenced and Corrupt Organizations ⇨ 104

Racketeer Influenced and Corrupt Organizations (RICO) Act was not designed to punish mere repeated offenses. N.J.S.A. 2C:41-1, subd. d(2).

9. Racketeer Influenced and Corrupt Organizations ⇨ 101

Racketeer Influenced and Corrupt Organizations (RICO) Act's pro-

vision for "pattern of racketeering activity" is not unconstitutionally vague; statute makes clear that when certain conduct that legislature has already made criminal is committed in certain ways with certain purpose, it will carry enhanced penalty. N.J.S.A. 2C:41-1, subd. d, 2C:41-2, subd. c.

10. Racketeer Influenced and Corrupt Organizations ⇨ 101

Potential uncertainty in marginal fact situations does not render Racketeer Influenced and Corrupt Organizations (RICO) Act, particularly its provision for "pattern of racketeering activity," unconstitutionally vague with respect to challenging defendant's conduct. N.J.S.A. 2C:41-1, subd. d, 2C:41-2, subd. c.

11. Racketeer Influenced and Corrupt Organizations ⇨ 101

To succeed on as-applied challenge to Racketeer Influenced and Corrupt Organizations (RICO) Act, particularly its provision for "pattern of racketeering activity," defendant must show that RICO could not reasonably be applied to his or her alleged conduct. N.J.S.A. 2C:41-1, subd. d. 2C:41-2, subd. c.

12. Racketeer Influenced and Corrupt Organizations ⇨ 101

Term "pattern of racketeering activity," within meaning of Racketeer Influenced and Corrupt Organizations (RICO) Act, was not unconstitutionally vague as applied to defendants who participated in unlawful scheme to dump solid waste generated in New York at several unauthorized New Jersey sites; any person of ordinary intelligence would have realized that defendants' activities constituted conduct that law proscribed. N.J.S.A. 2C:41-1, subd. d, 2C:41-2, subd. c.

13. Racketeer Influenced and Corrupt Organizations ⇨ 107

In order to "conduct or participate" in enterprise under Racketeer Influenced and Corrupt Organizations (RICO) Act, defendant need not be found to have exercised responsibilities of operation or management, but, rather, to "conduct or participate" in affairs of enterprise means to act purposefully and knowingly in affairs of enterprise in sense of engaging in activities that seek to further, assist or help effectuate goals of enterprise; those activities may include acts that are managerial or supervisory or exercise control and direction over goals, or over methods used to achieve goals, of enterprise, but participatory conduct or activities may also be found in acts that are below managerial or

supervisory level, and do not exert control or direction over affairs of enterprise, as long as actor, directly or indirectly, knowingly seeks to carry out, assist or further operations of enterprise or otherwise seeks to implement or execute managerial or supervisory decisions. N.J.S.A. 2C:41-2, subd. c.

14. Racketeer Influenced and Corrupt Organizations ⇨ 107

Under Racketeer Influenced and Corrupt Organizations (RICO) Act, person is "employed by or associated with" enterprise if he or she has position or functional connection with enterprise that enables him or her to engage or participate directly or indirectly in affairs of enterprise. N.J.S.A. 2C:41-2, subd. c.

15. Conspiracy ⇨ 24(1)

In order to be convicted of "conspiracy" to violate Racketeer Influenced and Corrupt Organizations (RICO) Act, defendant ned not agree to commit personally at least two acts of racketeering but, rather, defendant's agreement that others will commit predicate acts is sufficient. N.J.S.A. 2C:41-2, subd. d.

16. Conspiracy ⇨ 24(1)

Under traditional standards, gravamen of crime of "conspiracy" is criminal agreement. N.J.S.A. 2C:5-2, subd. a.

17. Conspiracy ⇨ 24(3)

To be guilty of "conspiracy," conspirators do not have to know each other, nor need they have personal knowledge of outcome of plan, and they do not have to join in common purpose at same time. N.J.S.A. 2C:5-2, subd. b.

18. Conspiracy ⇨ 28(3)

Fundamental tenet of construction of Racketeer Influenced and Corrupt Organizations (RICO) Act is that RICO creates new remedies but not new crimes, such that "conspiracy" to violate RICO should not require anything beyond that required for conspiracy to violate any other federal crime. N.J.S.A. 2C:41-2, subd. d.

19. Conspiracy ⇨ 28(3)

For purposes of statute proscribing conspiracy to violate Racketeer Influenced and Corrupt Organizations (RICO) Act, phrase "through a

pattern of racketeering activity" modifies language preceding it, "the conduct of such enterprise's affairs," rather than phrase "conspiring to conduct or participate." N.J.S.A. 2C:41-2, subd. d.

20. Racketeer Influenced and Corrupt Organizations ⇨ 123

Jury instruction improperly defining "enterprise" under Racketeer Influenced and Corrupt Organizations (RICO) Act as requiring structure beyond that necessary to commit racketeering agreement to commission of those acts was indisputable. N.J.S.A. 2C:41-2, subd. d.

21. Racketeer Influenced and Corrupt Organizations ⇨ 121

Evidence supported jury's determination of existence of "enterprise" in Racketeer Influenced and Corrupt Organizations (RICO) Act prosecutions of defendants in connection with unlawful scheme to dump solid waste generated in New York at unauthorized New Jersey sites, despite claim that there was no common purpose because each defendant was interested chiefly in his own profit; all defendants were aware of illegal objective of enterprise, and discussed their plans frequently, and scheme entailed enterprise that displayed organization of its members as evidenced by interaction of participants, and extensive planning, coordination and cooperation necessary to effectuate its objectives. N.J.S.A. 2C:41-1, 2C:41-2, 2C:41-6.

22. Racketeer Influenced and Corrupt Organizations ⇨ 121

There was sufficient evidence of "pattern of racketeering activity" committed by defendants to support their convictions under Racketeer Influenced and Corrupt Organizations (RICO) Act in connection with scheme to dump solid waste generated in New York at unauthorized New Jersey sites; defendants engaged in repeated incidents of racketeering activity that involved same participants throughout most of enterprise and same methods of commission, defendants had system ensuring that enterprise ran smoothly, repeated criminal acts were related by having common purpose of furthering goal of enterprise, i.e., to make money from illegal dumping, and acts were enterprise's regular way of doing business and were ongoing in that they occurred over period of time and posed threat of continuation into future. N.J.S.A. 2C:41-1, subd. d, 2C:41-2, subd. c.

23. Conspiracy ⇨ 48.2(2)

Racketeer Influenced and Corrupt Organizations ⇨ 123

Jury instructions concerning participation and conspiracy in Racketeer Influenced and Corrupt Organizations (RICO) Act prosecution effectively covered each of essential aspects of standard adopted by Supreme Court; charge required that participation be "knowing," and that defendants be "aware of the scope and unlawful activities of the enterprise," and charge required that "acts" of defendants be "related to the activity of the Enterprise" or be undertaken because of defendant's position or control within enterprise. N.J.S.A. 2C:41-2, subd. c.

24. Racketeer Influenced and Corrupt Organizations ⇨ 121

There was sufficient evidence of participation to support defendants' convictions under Racketeer Influenced and Corrupt Organizations (RICO) Act in connection with unlawful scheme to dump solid waste generated in New York at unauthorized New Jersey sites; defendants were all key players in illegal scheme, without whose participation and direction enterprise could not have been successful, and all defendants actually committed acts of racketeering to further conspiracy. N.J.S.A. 2C:41-2, subd. d.

25. Conspiracy ⇨ 48.2(2)

Trial court jury instructions correctly conveyed to jury standards for determining Racketeer Influenced and Corrupt Organizations (RICO) Act "conspiracy"; jury was instructed, inter alia, that state did not have to prove that defendant actually committed crime of racketeering, but had to prove that defendant agreed with at least one other that one of them would commit crime, and that, to be member of conspiracy, person did not have to know all details of conspiracy or know all its members, but must be aware of scope and unlawful activities of conspiracy. N.J.S.A. 2C:41-2, subd. d.

26. Conspiracy ⇨ 47(3.1)

Evidence supported defendants' convictions for conspiracy to violate Racketeer Influenced and Corrupt Organizations (RICO) Act in connection with scheme to dump solid waste generated in New York at unauthorized New Jersey sites; defendants actually committed acts of racketeering to further conspiracy and, thus, agreement to commission of those acts was indisputable. N.J.S.A. 2C:41-2, subd. d.

Harold J. Ruvoldt, Jr., argued the cause for appellants George Hurtuk, Joseph Dulanie, and Joseph Mocco (*Ruvoldt & Ruvoldt,* attorneys; *Mr. Ruvoldt* and *Kimberly A. Hintze-Wilce,* on the briefs).

Philip A. Ross, Designated Counsel, argued the cause for appellant Richard Bassi (*Susan L. Reisner,* Public Defender, attorney).

Donald T. Thelander, Assistant Deputy Public Defender, agued the cause for appellant Michael Havan (*Susan L. Reisner,* Public Defender, attorney; *William P. Welaj,* Designated Counsel, on the letter brief).

Robert E. Bonpietro, Deputy Attorney General, argued the cause for respondent (*Deborah T. Poritz,* Attorney General of New Jersey, attorney).

Harvey Weissbard argued the cause for *amicus curiae* Association of Criminal Defense Lawyers of New Jersey (*Weissbard & Weiwiorka,* attorney and *Crummy, Del Deo, Dolan, Griffinger & Vecchione,* attorneys; *Mr. Weissbard and Lawrence S. Lustberg,* on the briefs).

The opinion of the Court was delivered by

HANDLER, J.

This criminal appeal arises from defendants' participation in an unlawful scheme to dump solid waste generated in New York at several unauthorized New Jersey sites. Defendants were prosecuted and convicted under the New Jersey Racketeer Influenced and Corrupt Organization Act, commonly referred to as the RICO Act. In appealing their convictions, defendants raised several RICO issues, as well as many non-RICO issues. The Appellate Division affirmed the convictions. 268 *N.J. Super.* 72, 632 A.2d 1222 (1993). This Court granted defendants' petitions for certification, "limited solely to the issues raised regarding construction of the New Jersey Racketeer Influencd and Corrupt Organizations Act." 135 *N.J.* 304, 305, 639 A.2d 304 (1994).

The RICO Act, generally, makes it a crime for a person to be employed by or associated with "an enterprise" and to engage or participate or become involved in the business of the enterprise "through a pattern of racketeering activity." *N.J.S.A.* 2C:41-2B and 2c. The Act also makes it a crime for a person to conspire to engage in such conduct. *N.J.S.A.* 2C:41-2d. Defendants were prosecuted and convicted under those provisions of the RICO Act.

The meaning and application of those provisions constitute the central inquiry in this appeal. Ultimately, in light of our interpretation of the RICO Act, the appeal presents the questions of whether the trial

court adequately instructed the jury with respect to the proper understanding and application of the critical RICO provisions, and whether the evidence was sufficient to support the RICO convictions under those provisions.

I

The Legislature adopted the New Jersey Racketeer Influenced and Corrupt Organizations Act, *N.J.S.A.* 2C:41-1 to -6.2, in 1981. Convictions in this case were based on violations of *N.J.S.A.* 2C:41-2c and 2d. The extensive evidence introduced at trial is recited in detail in the opinion of the Appellate Division. 268 *N.J. Super.* at 82-88, 632 A.2d 1222. That evidence, for the most part not disputed, consisted of testimony of witnesses to the dumpings, surveillance videotapes, recorded telephone conversations, and records created and maintained by the various defendants.

Defendants Michael Harvan and Richard Bassi were the "dirt brokers" who arranged for and operated the illegal dump sites in North Bergen, Newark, and at the Hackensack Meadowlands Development Commission (HMDC) baling facility. They located property to be filled and recruited haulers looking for inexpensive places to dump. Defendants George Hurtuk, Joseph Dulanie, and Joseph Mocco were North Bergen public officials who accepted cash bribes to protect and promote the illicit landfills in the town. At the time of the scheme, Hurtuk was the license inspector, Dulanie was the deputy chief of police, and Mocco was the town clerk. Also necessary to the operation were haulers such as defendant Patrick Ball, since deceased, who carted the waste from New York and disposed of it at the sites arranged by Bassi and Harvan at a lower cost than they would have had to pay to dump in New York. Other participants in the dumping scheme included the lookouts at the dump sites, a money launderer, and a "fixer," who handled any problems that arose during the operation.

The HMDC is a state agency controlling zoning and planning in all or part of fourteen towns comprising the Hackensack Meadowlands. The portions of North Bergen in which the dumping occurred are within that area. Any landfill within the area needed permits from the HMDC and from the Department of Environmental Protection (DEP). To avoid obtaining the agency permits, Bassi and Harvan bribed the North Bergen public-official defendants to gain their permission to dump debris at both the sites in North Bergen and the HMDC baler, and to obtain their assurance that they would intercept and handle any

permit problems.

The evidence indicates that the dumping in North Bergen began in January 1986 at 83rd Street and West Side Avenue. That month, a North Bergen police officer encountered the dumping activity while Harvan was present. Harvan told him that he was in charge of the trucks at the site and that Hurtuk, the town license inspector, had given him permission to use the property for dumping.

In February, the dumping moved to a site near 69th Street and West Side Avenue. For that site, Harvan hired a night checker for $150 a day to copy the license-plate numbers of the the trucks dumping there and to record the number of loads dumped each night. The night checker testified that Harvan was present at the site every night it operated and that both Bassi and Hurtuk were present on the first night the site was used. Harvan instructed the checker to call Hurtuk if he had any trouble at the site. The police investigated the dumping several times, and eventually an order from Hurtuk was posted at police headquarters stating that dumping was permitted at the 69th Street location.

In March, the dumping moved to another area near 83rd Street. Later that month, both the Division of Criminal Justice (DCJ) and the HMDC began investigating the landfill operation. When DCJ personnel inquired about the dumping, the town clerk, Mocco, assured the investigators that HMDC had granted permission for the dumping, although it had not, and produced a license issued to a fictitious M. Black.

Days later, the dumping ceased at 83rd Street and a new dump opened at the Walsh Trucking propety. The DCJ surveillance continued, and the dumping proceeded at the Walsh site into the second week of May. The investigators saw Bassi, Harvan, Hurtuk, and Dulanie at the site during that period.

On May 15, pursuant to court orders, CDJ installed wiretaps on Bassi's home telephone. Shortly after one truck had become entangled in a utility wire and caused an explosion, in a recorded conversation, Harvan told Bassi that Mocco had told him "don't worry about [the wire]. . . Keep rolling.'" The dumping continued at both the 83rd Street and Walsh sites and the enterprise also used the HMDC baling facility. The haulers who had contracted with Bassi and Harvan indicated on HMDC forms that the waste originated in a place approved for dumping at that baler, such as Clifton, when in fact the waste came from New York. In addition, the trucks had magnetic signs reading "Big M" or "Harbas Trucking" placed over the name

painted on the side of the trucks.

By early June, the investigation had made dumping so risky that Bassi and Harvan told the haulers to take loaded trucks back to New York. Recorded conversations between Bassi and Harvan reveal that they were annoyed by their problems in North Bergen because they had paid their "rent" to the town officials. They continued to work with the town officials, however, to try to resume dumping in North Bergen.

The enterprise was financially rewarding to all its participants. Seized financial records covering the period from February to June 1986 revealed that the billings of Harvan and Bassi for dumping totalled $888,220 and that they each netted approximately $300,000 to $350,000 from the operation. Written records of the expenses of the scheme covering a three-month period show payments ranging from $100 to $1,000 to the "boss" or "big guy," referring to Mocco, totalling $29,100; to the "chief," referring to Dulanie, totalling $42,100; and to the "fat man," referring to Hurtuk, totalling $27,500. The haulers benefitted from the operation because Bassi and Havan charged approximately half of the estimated $575 that haulers would have had to pay to dump legally in New York.

On April 1, 1987, the grand jury handed down a 116-count indictment charging Bassi, Harvan, Hurtuk, Mocco, and Dulanie, among others, with various crimes including racketeering, conspiracy to commit racketeering, bribery, theft of services, falsifying and tampering with public records, forgery, and the unlawful engagement in the business of solid waste collection and disposal. Defendants' trial began on October 11, 1988, and lasted until April 17, 1989, and all were convicted of certain of the charges.

The jury found Bassi and Harvan guilty of conspiracy to commit racketeering, contrary to *N.J.S.A.* 2C:41-2d, and of racketeering, contrary to *N.J.S.A.* 2C:41-2c. It also found them both guilty of bribery, in violation of *N.J.S.A.* 2C:27-2c and -2d and *N.J.S.A.* 2C:2-6; uttering a forged instrument, in violation of *N.J.S.A.* 2C:21-1 and *N.J.S.A.* 2C:2-6; and engaging in solid-waste disposal without a certificate of public convenience, contrary to *N.J.S.A.* 48:13-A-6 and *N.J.S.A.* 48:13A-12. The jury convicted Hurtuk, Dulanie, and Mocco of conspiracy to commit racketeering, contrary to *N.J.S.A.* 2C:41-2d; as well as of bribery, contrary to *N.J.S.A.* 2C:27-2c, and of official misconduct, contrary to *N.J.S.A.* 2C:30-21. Dulanie and Hurtuk were also found guilty of official misconduct, in violation of *N.J.S.A.*

2C:30-2b. Lastly, Mocco and Hurtuk were convicted of bribery, in violation of *N.J.S.A.* 2C:27-2d.

The court sentenced both Bassi and Harvan to aggregate terms of seventeen years imprisonment and fined them each $150,000. It also imposed Violent Crimes Compensation Board (VCCB) penalties of $450 on each defendant. The court merged the conspiracy-to-commit-racketeering conviction with the racketeering conviction with the racketeering conviction, but did not merge the other convictions with those for racketeering. The court sentenced Hurtuk to an aggregate prison term of fifteen years, and ordered him to make restitution in the amount of $27,000. The court also fined him $75,000 and imposed a VCCB penalty of $90. Dulanie was sentencd to an aggregate prison term of fifteen years, and was ordered to make restitution in the amount of $41,600. The court fined him $75,000 and imposed a VCCB penalty of $60. Mocco was sentenced to an aggregate prison term of twenty years, and ordered to make restitution in the amount of $56,300. The court fined him $200,000 and imposed a VCCB penalty of $90. The sentencing court did not merge any of the other convictions into the conspiracy-to-commit-racketeering conviction.

II

[1] The gravamen of a RICO violation, frequently referred to as "racketeering," is the involvement in the affairs of an enterprise through a pattern of racketeering activity. Specifically, the RICO Act provides:

> c. It shall be unlawful for any person employed by or associated with any enterprise engaged in or activities of which affect trade or commerce to conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
> d. It shall be unlawful for any person to conspire as defined in *N.J.S.* 2C5-2, to violate any of the provisions of this section. [*N.J.S.A.* 2C:41-2]

We consider first the interpretation to be accorded the term "enterprise." *N.J.S.A* 2C:41-1 provides a definition:

> c. "Enterprise" includes any individual, sole proprietorship, partnership, corporation, business or charitable trust, association, or other legal entity, any union or group of individuals

associated in fact although not a legal entity, and it includes illicit as well as licit enterprises and governmental as well as other entities.

[2] At the outset we note that the definitions of "enterprise" in the federal and New Jersey RICO statutes are similar.[1] Indeed, as originally introduced in the Assembly in February 1980, the New Jersey RICO statute paralleled federal RICO. The Legialature, however, came to perceive purposes and goals to be achieved by the proposed anti-racketeering statute distinct from those of the federal statutory scheme. Consequently, in many respects our Legislature departed from the federal example. Nevertheless, because the federal statute served as an initial model for our own, we heed federal legislative history and case law in construing our statute.

The legislative history for federal RICO indicates that Congress' prime concern was the eradication of "organized crime." *United States v. Turkette,* 452 *U.S.* 576, 591, 101 *S.Ct.* 2524, 2532, 69 *L.Ed.*2d 246, 259 (1981). Congress' specific intentions, though, were not in every respect apparent, and so there has evolved an extensive and variegated jurisprudence on federal RICO. Among the subjects debated in the jurisprudence is the meaning of "enterprise." David Vitter, *The RICO Enterprise as Distinct from the Pattern of Racketeering Activity: Clarifying the Minority View,* 62 *Tul.L.Rev.* 1419 (1988).

The history of federal court attention to the problem of the meaning of "enterprise" begins, for our purposes, with the United States Supreme Court's decision in *Turkette, supra,* in which the Court considered the meaning of the federal statute's "enterprise" element. Prior to that decision, however, in New Jersey in 1978 an Organized Crime Task

[1]The statement of activities prohibited under Federal RICO reads:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

[18 *U.S.C.A.* ‡ 1962.]

The federal RICO statute defines "enterprise" as follows:

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

[18 *U.S.C.A.* ‡ 1961.]

Force issued a Report. It noted that by 1968, New Jersey had acquired a national reputation as a haven for organized crime. Organized Crime Task Force, *Report* at 1 (1978) [hereinafter *Report*]. The Report evaluated the steps New Jersey had taken to protect the integrity of local government and law enforcement agencies, and made recomendations for improving efforts to eradicate organized crime in this State. The Task Force focused on the problem of infiltration of organized crime into government and legitimate businesses.

The Legislature, however, refused to limit the statute's application to cases of infiltration of legitimate business by organized crime. *N.J.S.A.* 2C:41-1c. Moreover, the Legislature decided not to limit the statute's application only to such traditional organized crime interests as the Mafia. Instead, the Legislature determined that the statute should broadly cover "organized crime type activities." *N.J.S.A.* 2C:41-1.1c.

In 1981, the year of the enactment of the New Jersey statute, the Supreme Court decided *Turkette, supra.* The Supreme Court considered whether "enterprise" under RICO encompassed wholly illegitimate as well as legitimate enterprises. It concluded that illegitimate enterprises were covered, noting that although the main aim of the legislation was to prevent the infiltration of criminal elements into legitimate businesses, the statutory language was not so limited. 452 *U.S.* at 580, 101 *S.Ct.* at 2527, 69 *L.Ed.*2d at 253. The Court defined "an enterprise" as a "group of persons associated together for a common purpose of engaging in a course of conduct," and held that an enterprise is established by "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Id.* at 583, 101 *S.Ct.* at 2528-29, 69 *L.Ed.*2d at 254.

In addition to interpreting "enterprise," the Supreme Court in *Turkette* stated that prosecutors bear the burden of proof under RICO to show the existence of both an enterprise and a pattern of racketeering activity; although the proof used to establish the separate elements may "coalesce," proof of one would not necessarily establish the other. *Id.* at 583, 101 *S.Ct.* at 2528-29, 69 *L.Ed.*2d at 254-55. The Court thus took care to distinguish the "enterprise" element from the "pattern of racketeering activity" element, stating that the enterprise "is an entity separate and apart from the pattern of activity in which it engages." *Id.* at 583, 101 *S.Ct.* at 2525, 69 *L.Ed.*2d at 255.

After *Turkette,* federal courts struggled to apply its rule to paticular cases. The Third Circuit Court of Appeals in *United States v. Riccobene,*

709 *F.*2d 214, 221-24, *cert. denied,* 464 *U.S.* 849, 104 *S.Ct.* 157, 78 *L.Ed.*2d 145 (1983), determined that according to *Turkette,* an enterprise had three components: an ongoing organization, continuing membership, and a separateness, and that the establishment of an "enterprise" required proof of "some sort of structure." *Id.* at 222. The Eighth Circuit Court of Appeals concluded that the "enterprise" element required proof of an "ascertainable structure" distinct from such organization as is necessary to the coordinated act of racketeering. *United States v. Bledsoe,* 674 *F.*2d 647, 665, *cert. denied,* 459 *U.S.* 1040, 103 *S.Ct.* 456, 74 *L.Ed.*2d 608 (1982). In *Bledsoe,* the court explained that proof of an "ascertainable structure" is essential to avoid collapsing the two components of a RICO crime—the involvement in a distinct enterprise and in a pattern of racketeering activity—into a single component. 674 *F.*2d at 663-65.

Several courts have rejected the view that a distinct "ascertainable structure" is a necessary component of a RICO enterprise. Those courts have applied *Turkette* literally, requiring proof only of an ongoing informal organization. *See, e.g., United States v. Cagnina,* 697 *F.*2d 915, 921 (11th Cir.), *cert. denied,* 464 *U.S.* 856, 104 *S.Ct.* 175, 78 *L.Ed.*2d 157 (1983); *United States v. Pelullo,* 964 *F.*2d 193, 212 (34d Cir.1992); *United States v. Perholtz,* 842 *F.*2d 343, 362-63 (D.C.Cir.), *cert. denied,* 488 *U.S.* 821, 109 *S.Ct.* 65, 102 *L.Ed.*2d 42 (1988); *United States v. Mazzei,* 700 *F.*2d, 85, 89-90 (2nd Cir.), *cert. denied,* 461 *U.S.* 945, 103 *S.Ct.* 2124, 77 *L.Ed.*2d 1304 (1983). In *United States v. Bagaric,* 706 *F.*2d 42, 56, *cert. denied,* 464 *U.S.* 840, 917, 104 *S.Ct.* 133, 134, 283, 78 *L.Ed.*2d 128, 261 (1983), the Second Circuit Court of Appeals took perhaps the broadest approach in stating that "any associative group" may be characterized "in terms of what it *does,* rather than by abstract analysis of its structure." (emphasis in original). The Eleventh Circuit Court of Appeals observed in *United States v. Weinstein,* 762 *F.*2d 1522, 1537 (1985), *cert. denied,* 475 *U.S.* 1110, 106 *S.Ct.* 1519, 89 *L.Ed.*2d 917 (1986), that "the definitive factor in determining the existence of a RICO enterprise [is] an association of individuals, however loose or informal, which furnishes a vehicle for the commission of two or more predicate crimes." *See* Vitter, *supra,* 62 *Tul.L.Rev.* at 1438-40 (noting that distinctness of enterprise is evidenced by many traits, including "a decision-making structure" and "an advanced division of labor").

Over thirty states have some form of anti-racketeering act, all of which are modeled generally on federal RICO. Georgia, New Mexico, and Oregon have rejected the position that an ascertainable structure distinct from the pattern of racketeering activity is required to prove an enterprise. *See Martin v. State,* 189 *Ga.App.* 483, 376 *S.E.*2d 888, 892-93 (1988); *State v. Hughes,* 108 *N.M.* 143, 148-49, 767 *P.*2d 382, 389-88 (App.1988); *State v. Cheek,* 100 *Or.App.* 501, 786 *P.*2d. 1305, 1307-08 (1990). In contrast, Florida, and New York (whose statute is unique in that it explicitly requires an enterprise to have "an ascertainable structure distinct from a pattern of racketeering activity," *N.Y. Penal Law* ‡ 460.10(3) (McKinney 1989)) insist that the State establish that the alleged enterprise had a structure and that it was separate from the pattern of racketeering activity. *See Boyd v. State,* 578 *So.*2d 718, 721-22 (Fla.App.1991), *review. den.* 581 *So.*2d 1310 (Fla.1991); *People v. Wakefield Fin. Corp.,* 155 *Misc*2d 775, 590 *N.Y.S.*2d 382, 388-89 (Sup.Ct.1992). Minnesota requires a showing "that there is an organizational set-up, whether formal or informal, that not only exists to commit the predicate acts but also does more, such as coordinating those acts into an overall pattern of criminal activity." *State v. Huynh,* 519 *N.W.*2d 191, 196 (Minn.1994). Idaho and Pennsylvania rely on *Turkette* for their definitions of "enterprise." See *State v. Hansen,* 125 *Idaho* 927, 930-33, 877 *P.*2d 898, 903-03 (1994); *Commonwealth v. Donahue,* 428 *Pa.Super.* 259, 630 *A.*2d 1238, 1245-46 (1993), *review den.* 538 Pa. 612, 645 *A.*2d 1316 (1994).

Clearly, courts have not found any one uncontroversial definition of "enterprise." Indeed, an empirical study indicates that, even as used in common parlance, the word "enterprise" has no single, well-established meaning. *See* Clark D. Cunningham, et al., *Plain Meaning and Hard Cases,* 103 *Yale L.J.* 1561 (1994).

The Appellate Division here reasoned that " 'the nature of the misconduct often provides the best clue toward defining the enterprise... [I]t is logical to characterize any associative group in terms of what it *does,* rather than by abstract analysis of its structure.' " 268 *N.J.Super.* at 107, 632 *A.*2d 1222 (quoting *Bagaric, supra,* 706 *F.*2d at 55-56). It accordingly held that

> [t]he "enterprise element will be satisfied if there exists a group of people, no matter how loosely associated, whose existence

> or association provides or implements the common purpose of commiting two or more predicate acts. We go so far as to hold [that] the "enterprise" element is satisfied if the "enterprise" is no more than the sum of the racketeering acts. Thus, the "enterprise" does not have to be an organization whose purpose is greater than the predicate acts, nor does it have to evidence any definable structure.
>
> (268 *N.J. Super.* at 143, 632 *A.*2d 1222]

Our understanding of the term "enterprise" is derived from the extensive legislative history and decisional law dealing with both the State and federal RICO statutes. Those sources support the following conclusions. First, the RICO statute itself in using the term "enterprise" contains no express or implied requirement for a distinct ascertainable stucture; rather, it is framed broadly to include any group of persons "associated in fact." Second, the legislative history shows that the term "enterprise" was meant to be construed broadly. The statute itself, *N.J.S.A.* 2C:41-6, commands the liberal construction of "enterprise." The drafters intended New Jersey RICO to encompass more than traditional organized-crime families, which commonly contain an internal command system or structure. Rather, the Legislature intended its statute to reach less organized and non-traditional criminal elements as well.[2] Assembly Judiciary, Law, Public Safety and Defense Committee, *Meeting on A-1079,* at 1 (Oct. 30, 1980) [hereinafter, *Committee Meeting.*] Further, the definition of "enterprise" was changed to include sole proprietorships, business and charitable trusts, illicit enterprises, and governmental "as well as other entities," *N.J.S.A.* 2C:41-1c, which changes were meant "to broaden the definition of enterprise." *See Committee Meeting, supra.*

In addition, the Legislature's intent not to cover small-scale operations by its broad definition of "enterprise" was expressed in the state-

[2]For example, the Assembly Committee recognized that a scheme to defraud the Medicaid system by a New Jersey couple or a group associated for the purpose of throwing a business into bankruptcy to defraud investors were "enterprises" within RICO's definition of the term. In discussing examples of what activities the Act targeted, the members agreed that the bill intended "to get away from the stereotype of using the term, "Mafia", rather, the Act would cover any situation in which a few persons exerted significant control over the social and political fabric of a community through illicit profits. *Committee Meeting, supra.* at 3-4.

ment in the Declaration of Policy and Legislative Findings, *N.J.S.A.* 2C:41-1.1c, that the Act should target only organized-crime-type activities that are substantial in nature. *See also Committee Meeting* at 2 (RICO sanctions are directed toward "substantial organized crime activity."). Lastly, the Supreme Court's discussion of enterprise in *Turkette* refers to organization, not structure, and fairly understood, required only an informal organization functioning as a continuing unit.

[3] Accordingly, we hold, first, that under the RICO Act "enterprise" is an element separate from the "pattern of racketeering activity," and that the State must prove the existence of both in order to establish a RICO violation. The offenses proscribed in *N.J.S.A.* 2C:41-2a to -2d include both as elements of the crime. The enterprise is the association, and the pattern of racketeering activity consists of the predicate incidents. Nevertheless, evidence that serves to establish such an enterprise need not be distinct or different from the proof that establishes the pattern of racketeering activity.

[4] We hold, further, that because the enterprise is distinct from the incidents constituting the pattern of activity, it must have an "organization." The organization of an enterprise need not feature an ascertainable structure or a structure with a particular configuration. The hallmark of an enterprise's organization consists rather in those kinds of interactions that become necessary when a group, to accomplish its goal, divides among its members the tasks that are necessary to achieve a common purpose. The division of labor and the separation of functions undertaken by the participants serve as the distinguishing marks of the "enterprise" because when a group does so divide and assemble its labors in order to accomplish its criminal purposes, it must necessarily engage in a high degree of planning, cooperation and coordination, and thus, in effect, constitute itself as an "organization."

[5,6] This understanding of the kind of organization that establishes an "enterprise" is different from, but not necessarily inconsistent with, that understanding of "enterprise" premised on an "ascertainable structure." Thus, evidence showing an ascertainable structure will support the inference that the group engaged in carefully planned and highly coordinated criminal activity, and therefore will support the conclusion that an "enterprise" existed. Apart from an organization's structure as such, however, the focus of the evidence must be on the number of peo-

ple involved and their knowledge of the objectives of their association, how the participants associated with each other, whether the participants each performed discrete roles in carrying out the scheme, the level of planning involved, how decisions were made, the coordination involved in implementing decisions, and how frequently the group engaged in incidents or committed acts of racketeering activity, and the length of time between them.

III

The second major interpretive issue in the case involves the content of the element of "pattern of racketeering activity." We must consider, further, whether use of this phrase renders the statute unconstitutionally vague.

For criminal liability under RICO to attach, a defendant's involvement in an enterprise must be accomplished "through a pattern of racketeering activity." *N.J.S.A.* 2C:41-2c. A "pattern of racketeering activity," according to *N.J.S.A.* 2C:41-1d, requires:

> (1) Engaging in at least two incidents of racketeering conduct one of which shall have occurred after the effective date of this act and the last of which shall have occurred within 10 years (excluding any period of imprisonment) after a prior incident of racketeering activity; and
>
> (2) A showing that the incidents of racketeering activity embrace criminal conduct that has either the same or similar purposes, results, participants or victims or methods of commission or are otherwise interrelated by distinguishing characteristics and are not isolated incidents.

The New Jersey definition descends from the briefer federal definition of "pattern of racketeering activity."[3] The debate over how to interpret the federal "pattern of racketeering activity," 18 *U.S.C.A.* ‡

[3]The federal RICO statute defines "pattern of racketeering" activity as follows:
(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;
[18 *U.S.C.A.* ‡ 1961.]

1961(5), began with *Sedima, S.P.R.L. v. Imrex Co.*, 473 *U.S.* 479, 105 *S.Ct.* 3275, 87 *L.E.*2d 346 (1985). In a footnote, the Supreme Court noted that the definition of "pattern of racketeering activity" differs from the other definitions of the federal RICO statute in that it states that a pattern *requires* at least two predicate acts, not that it *means* two such acts. 473 *U.S.* at 496 n. 14, 105 *S.Ct.* at 3285 n. 14, 87 *L.Ed.*2d at 358 n. 14. Observing that two of anything rarely forms a "pattern," the Court stated that the statute implied that although two acts are necessary, they may not be sufficient. *Ibid.*

The signal in *Sedima* produced decisional conflicts among the circuits, which the Supreme Courts resolved in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 *U.S.* 229, 109 *S.Ct.* 2893, 206 *L.Ed.*2d 195 (1989). The Supreme Court determined in *H.J. Inc.* that the statutory definition of "pattern of racketeering activity," by using the term "requires," placed a broad "outer limit" on the concept of two predicate acts. *Id.* at 237, 109 *S.Ct.* at 2899, 106 *L.Ed.*2d at 206. From the legislative history, the Court deduced that " '[i]t is th[e] factor of *continuity plus relationship* which combines to produce a pattern.' " *Id.* at 239, 109 *S.Ct.* at 290, 106 *L.Ed.*2d at 208 (quoting 116 Cong.Rec., at 18940 (1970) (emphasis added))). Thus, according to the Court, proof of a pattern required a showing that the predicate acts "are related, *and* that they amount to or pose a threat of continued criminal activity." *Ibid.*

The relatedness requirement, the Court explained, covers " 'criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated events.' " *Id.* at 240, 109 *S.Ct.* at 2901, 106 *L.Ed.*2d at 208 (quoting and deriving its definition from the Dangerous Special Offender Act, 18 *U.S.C.A.* ‡ 3575(3), enacted in conjunction with RICO).

"Continuity," according to the Court, is "both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. It is, in either case, centrally a temporal concept." *Id.* at 241-42, 109 *S.Ct.* at 2902, 106 *L.Ed.*2d at 209 (citation omitted). The Court further determined that although relatedness and continuity make up two distinct prongs of the "pattern" requirement, proof of the two "will often overlap." *Id.* at 239, 109 *S.Ct.* at 2900, 106 *L.Ed.*2d at 208.

The meaning of "pattern of racketeering activity" has long perplexed courts. Indeed, before the United States Supreme Court declared a

definitive federal intepretation of the "pattern of racketeering activity" element, lower federal courts produced a variety of interpretations. Lisa Barsoomian, *RICO "Pattern" Before and After H.J. Inc.: A Proposed Definition,* 40 *Am.U.L.Rev.* 919, 925 (1991) (identifying five distinct understandings of the element).

The Eighth Circuit Court of Appeals read "pattern of racketeering activity" to require proof that the criminal enterprise operates at least two distinct, unconnected schemes. *See Phenix Fed. Sav. & Loan v. Shearson Lord Rhoades, Inc.,* 856 *F.*2d 1125, 1128 (1988), *cert. denied,* 489 *U.S.* 1066, 109 *S.Ct.* 1340, 103 *L.Ed.*2d 810 (1989). Other federal courts understood "pattern of racketeering activity" to require not two distinct schemes, but rather only participation "in two or more predicate acts or crimes," *e.g., United States v. Alexander,* 850 *F.*2d, 1500, 1506 (11th Cir. 1988), *cert. denied,* 489 *U.S.* 1068, 109 *S.Ct.* 1356, 103 *L.Ed.*2d 814 (1989), without the need to show some cogent relationship connecting the plurality of acts. *E.g., United States v. Elliott,* 571 *F.*2d 880, 897 n. 23 (5th Cir.1978), *cert. denied* 439 *U.S.* 953, 99 *S.Ct.* 349, 58 *L.Ed.*2d 344 (1978). Some federal courts before *H.J. Inc.* adopted a "totality of the circumstances" approach, *e.g. United Stattes v. Indelicato,* 865 *F.*2d 1370, 1381 (2d Cir.), *cert. denied.* 493 *U.S.* 811, 110 *S.Ct.* 56, 107 *L.Ed.*2d 24 (1989); *United States v. Zauber,* 857 *F.*2d 137, 149 (3d Cir.1988), *cert. denied,* 489 *U.S.* 1066, 109 *S.Ct.* 1340, 103 *L.Ed.*2d 810 (1989); *Barticheck v. Fidelity Union Bank,* 832 *F.*2d, 36, 39 (3d Cir.1987); *cf. Tabas v. Tabas,* 47 *F.*3d 1280, 1292-93 (3d Cir.1995) (abandoning totality of circmstances approach in light of *H.J., Inc.).*

State definitions of "pattern" also have significantly varied. The state statutes differ from New Jersey's and from one another in a variety of ways and those differences have, ultimately, influenced judicial interpretations. For example, New Jersey is the only state that provides that the pattern consists of at least two "incidents," as opposed to "acts." The statute also requires that at least two of the "incidents" of racketeering be related to each other. *Cf. Fla.Stat.Ann* ‡ 895.02(4) (West 1994) (providing, unlike New Jersey, pattern *means* at least two acts that are related to each other); *Ga.Code Ann.* ‡ 16-14-3(8) (Michie 1992) (same); *Idaho Code* ‡ 18-7803(d) (Michie 1987) (same); *Ind.Code* ‡ 35-45-6-1 (Michie 1987) (same); *see also Col.Rev.Stat.Ann.* ‡ 18-17-103(3) (West 1986) (same and providing also a relation of acts to the enterprise); *Or.Rev.Stat.* ‡ 166.715(4) (1993) (same). Some states have adopted a "relationship and continuity" interpretation of their pattern of racketeering activity element. *E.g., State v. Lucas,* 600 *So.*2d.1093,

1094-96 (Fla.1992); *Kollar v. State,* 556 *N.E.*2d 936, 940-41 (Ind.App.1990). Others reject the "continuity" element of the *H.J. Inc.* test. *E.g. People v. Chaussee,* 880 *P.*2d 749, 753-59 (Colo. 1994); *Larson v. Smith,* 194 *Ga.App.* 598, 391 *S.E.*2d, 686, 688 (1990); *Computer Concepts, Inc. v. Brandt,* 310 *Or.* 706, 801 *P.*2d 800, 807-09 (1990).

In ascertaining the meaning of "pattern of racketeering activity," the Appellate Division concluded that the New Jersey statute required relatedness but not continuity. It determined that "to establish a 'pattern[,]' it need * * * be shown [only that] the predicate acts are related. It is not necessary to show continuity as required under Federal RICO." 268 *N.J.Super.* at 144, 632 *A.*2d 1222.

In reaching that conclusion, the Appellate Division found explicit support in the statute itself for the relatedness requirement, *see N.J.S.A.* 2C:41-1d(2), but none for a requirement of continuity. 268 *N.J.Super.* at 142-43, 632 *A.*2d 1222. The court found persuasive the Oregon Supreme Court's reasoning in *Computer Concepts, supra,* 801 *P.*2d at 807-09, which emphasizes that the Oregon statute expressly defines pattern in terms of relatedness and that its legislature had not focused only on long-term or future-oriented racketeering. Similarly, the Appellate Division noted that the "Declaration of Policy and Legislative Findings' continued in *N.J.S.A.* 2C:41-1.1 did not refer to "long term criminal activity," but rather aimed to eliminate all organized criminal activity, regardless of duration. *Id.* at 142, 632 *A.*2d 1222. The court also found that the New Jersey Legislature intended its RICO statute to be even broader in scope than the federal act. *Id.* at 107, 632 *A.*2d 1222.

[7] The Appellate Division reasonably found in the statute and its legislative history an intent on the part of the Legislature not to require "continuity" as an element of "pattern of racketeering activity," at least not in any strong or distinctive sense of the term. We do not conclude, however, that "continuity" is irrelevant to demonstrating a "pattern of racketeering activity." We note that in discussing the definition of "pattern of racketeering activity," the Assembly Committee observed that the new version "substituted 'incident' for 'act' because "act" is a somewhat restrictive term . . . whereas an incident more aptly represents—a circumstance or happening." *Committee Meeting* at 7. We infer from the preference for the word "incident," with its perceived meaning of "happening" or "circumstance," that the Legislature intended to cover a broader spectrum of behavior than is connoted by "act." The pattern of racketeering activity and the activity criminalized under RICO should be, or threaten to be, ongoing.

In addition, the Legislature expressed its concern that the underlying incidents not be isolated events. *Ibid.* Chairman Herman remarked that criminal activity may have "interruptions" without thereby defeating the "pattern" element. A member of the Committee also commented that criminal activity "doesn't have to be continuous, in other words. You can have interruptions." Thus, the Comittee recognized that there had to be some "connective tissue among criminal incidents," but that it need not be continuous in the sense of completely uninterrupted as long as the incidents are not isolated or disconnected.

[8] Thus, RICO was not designed to punish mere repeated offenses. *Id.* at 8. The Deputy Attorney General acknowledged that to be consistent with the Legislature's declaration of purpose the pattern must be more than just a string of two or more similarly-committed crimes. *Id.* at 2. Indeed, our statute expressly enjoins use of the RICO statute to cover isolated criminal incidents. *N.J.S.A.* 2C:41-1d(2). Thus, "continuity," understood as an antonym of the terms "isolated" or "sporadic," points to "incidents of criminal conduct" that exhibit some ongoing connection. *E.g., Indelicato, supra.* 865 *F.*2d at 1383; *Sun Savings & Loan Ass'n. v. Dierdorff, supra.,* 825 *F.*2d 187, 192 (9th Cir.1987). We agree with Amicus that the statute itself implies some ongoing connection or continuity also in its express specification that "incidents of racketeering activity embrace criminal conduct that [is] . . . otherwise *interrelated* by distinguishing characteristics . . . ." *N.J.S.A.* 2C:41-1d(2) (emphasis added).

We thus conclude that some degree of continuity, or threat of continuity, is required and is inherent in the "relatedness" element of the "pattern of racketeering activity."

Obviously, different interpretive avenues present themselves. Although we do not require "continuity" as a distinctive subelement of "pattern," we find sound and persuasive the reasoning of those courts that use a "totality of the circumstances" approach in applying the federal "continuity plus relationship" test for determining the existence of a pattern of racketeering activity. *See, e.g., Banks v. Wolk,* 918 *F.*2d 418, 423 (3rd Cir.1990) (finding multi-factor test to survive *H.J., Inc.)* The theory underlying this totality-of-the-circumstances standard was articulated in *Indelicato, supra.* It interpreted footnote 13 of *Sedima, supra.* as

> not enshrin[ing] 'continuity plus relationship' as a determinative two-pronged test. Rather, the [United States Supreme] Court quotes the language to demonstrate how the pattern

requirement should be interpreted to prevent the application of RICO to the perpetrators of 'isolated' or 'sporadic' criminal acts.

[865 *F.*2d at 1383 (quoting *Sun Savings & Loan Ass'n., surpa,* 825 *F.*2d at 192.)]

The factor of "continuity," as acknowledged by the Supreme Court in *H.J. Inc.,* may itself be established by evidence that overlaps the evidence establishing "relatedness." 492 *U.S.* at 239, 109 *S.Ct.* at 2900, 106 *L.Ed.*2d at 208. As the court in *Zauber* stated:

[a] a combination of specific factors, "such as the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity", could be considered in determining whether a pattern existed.

[857 *F.*2d at 149 (quoting and applying holding of *Barticheck v. Fidelity Union Bank, supra.* 832 *F.*2d at 29).]

An understanding of "relatedness" based on a totality of circumstances is compatible with the statutory definition that enumerates several factors—purposes, results, participants, victims and methods and other characteristics—that may combine or be "otherwise interrelated" to establish a pattern from the "incidents of racketeering activity" that in any event may not be isolated." *N.J.S.A.* 2C:41-1d(2).

In the most likely setting, predicate incidents of racketeering conduct will occur sequentially over a period of time. New Jersey's legislative discussions, unlike Congress', do not indicate a concern for reaching only long-term criminal activity. But short-term criminal activity, to be covered, must encompass incidents of criminal conduct that are not disconnected or isolated. Incidents of racketeering that occur sequentially, to overcome any inference that they are totally disconnected or isolated, must exhibit some temporal connection or continuity over time.

Accordingly, we conclude that the primary criterion of New Jersey's "pattern of racketeering activity" is "relatedness." That calls for the application of a broad standard involving the totality of all relevant circumstances, which may include "continuity."

[9] We consider further defendant's contention that the RICO statute, paticularly its provision for "pattern of racketeering activity," is unconstitutionally vague. The Appellate Division found that the term

"pattern of racketeering activity" was not vague. 268 *N.J.Super.* at 144, 632 *A.*2d 1222. We agree.

[10] Vagueness challenges to RICO statutes have been rejected by every circuit to consider the issue. *United States v. Dischner,* 974 *F.*2d 1502, 1508 (9th Cir.1992), *cert. denied,—U.S.—,*113 *S.Ct.*1290, 122 *L.Ed.*2d 682 (1993). Those courts confirm that the lack of clarity in RICO does not necessarily mean that a vagueness challenge will succeed. *See, e.g., United States v. Woods,* 915 *F.*2d 854, 862-64 (3rd Cir.1990), *cert. denied,* 499 *U.S.* 947, 111 *S.Ct.* 1413, 113 *L.Ed.*2d 466 (1991); *United States v. Angiulo,* 897 *F.*2d 1169, 1178-80 (1st Cir.), *cert. denied,* 498 *U.S.* 845, 111 *S.Ct.* 130, 112 *L.Ed.*2d 98 (1990); *United States v. Van Dorn,* 925 *F.*2d 1331, 1334 n. 2 (11th Cir.1991); *United States v. Glecier,* 923 *F.*2d 496, 497 n. 1 (7th Cir.), *cert. denied,* 502 *U.S.* 810, 112 *S.Ct.*54, 116 *L.Ed.*2d 31 (1991); *United States v. Coiro,* 922 *F.*2d 1008, 1017 (2nd Cir.), *cert. denied,* 501 *U.S.* 1217, 111 *S.Ct.* 2826, 115 *L.Ed.*2d 996 (1991). Potential uncertainty in marginal fact situations does not render RICO vague with respect to the challenging defendant's conduct. *Dischner, supra.* 974 *F.*2d at 1510.

The United States Supreme Court has not squarely confronted a RICO "vagueness" challenge, but it has supplied some clues about its views. In *Fort Wayne Books, Inc. v. Indiana,* 489 *U.S.* 46, 58, 109 *S.Ct.* 916, 924-25, 103 *L.Ed.*2d 34, 48 91989), the Court found that Indiana RICO was not vague as applied in the context of the defendants' obscenity predicate offenses. The Court observed that RICO is inherently *less* vague than any of the sttutes criminalizing the predicate acts because "a prosecution under the RICO law will be possible only where all the elements of [the underlying offense] are present, and then some." *Id.* at 58 n. 7, 109 *S.Ct.* at 925 n. 7, 103 *L.Ed.*2d at 48 n. 7. *See H.J., Inc., supra,* 492 *U.S.* 229, 235, 109 *S.Ct.,* 2893, 2898, 106 *L.Ed.*2d, 195, 205 (rejecting a similar challenge in the course of interpreting "pattern of racketeering activity").

A statute is vague on its face if "there is no conduct that it proscribes with sufficient certainty." *State v. Cameron,* 100 *N.J.* 586, 593, 498 *A.*2d 1217 (1985). A statute may also be vague as applied if "the law does not with sufficient clarity prohibit the conduct against which it is sought to be enforced." *Ibid.*

[11] The Appellate Division concluded that defendants had not demonstrated that the statute's definition of "pattern" failed to put them on notice that their behavior constituted a pattern of racketeering activity under RICO. 268 *N.J.Super.* at 117, 632 *A.*2d 1222. The court

correctly noted that to succeed in an as-applied challenge to RICO, a defendant must show that RICO could not reasonably be applied to his or her alleged conduct. *Id.* at 117, 632 *A.*2d 1222. The court also found that even if RICO may be unconstitutionally vague in some marginal situations, it was not vague with respect to these defendants, whose actions involved submitting fraudulent forms at the baler, bribing public officials for licenses, and money laundering. *Id.* at 117-18, 632 *A.*2d 1222 *See State v. Passante,* 225 *N.J.Super.* 439, 446-50, 542 *A.*2d 952 (Law Div. 1987).

[12] We conclude that the term "pattern of racketeering activity" is not unconstitutionally vague. The statute makes clear that when certain conduct that the Legislature has already made criminal is committed in a certain way with a certain purpose, it will carry an enhanced penalty. The term is also not vague as applied to defendants. Any person of ordinary intelligence would realize that defendants' activities constituted conduct that the law proscribed.

IV

The State charged that the defendants "participate[d], directly or indirectly, in the conduct of the enterprise's affairs," in violation of *N.J.S.A.* 2C:41-2c. Defendants were also charged under *N.J.S.A.* 2C:41-2d, which provides that "(i)t shall be unlawful for any person to conspire as defined by *N.J.S.* 2C:5-2, to violate any of the provisions of this section." Defendants contend that the State failed to prove that they conspired to engage in such unlawful participation. The issues with respect to the meaning and application of these provisions are interrelated.

A.

N.J.S.A. 2C:41-2c, as earlier noted, provides that

> [i]t shall be unlawful for any person employed by or associated with any enterprise engaged in or activities of which affect trade or commerce to conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

In drafting this section of the statute, the Legislature again for guidance looked to the parallel provision of the federal RICO statute, 18 *U.S.C.* ‡ 1962(c), which uses virtually the same terms.

The United States Supreme Court in *Reves v. Ernst & Young,* 507

U.S.—, 113 *S.Ct.* 1163, 122 *L.Ed.*2d 525 (1993), interpreted the phrase "to conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs," a phrase identical to that used in the New Jersey provision. The Court concluded that as both a noun and a verb, the word "conduct" required an element of direction, and "participate" meant "to take part in." Thus, to satisfy subsection (c), according to the Court, one must have some part in directing the affairs of the enterprise, and hence the Court imposed an "operation or management" test. *Id.* at—, 113 *S.Ct.* at 1169-70, 122 *L.Ed.*2d at 536-37.

Justice Souter, joined by Justice White, dissented. He stated that the noun "conduct" simply meant "carrying forward" and implied no element of direction. *Id.* at—, 113 *S.Ct.* at 1174, 122 *L.Ed.*2d at 542. Moreover, even if the Court "call[ed] it a tie" on the definitional analysis, the liberal-construction clause counseled against the majority's narrower reading. *Id.* at—, 113 *S.Ct.* at 1175, 122 *L.Ed.*2d at 542-43. *See* Bryan T. Camp, *Dual Construction of RICO: The Road Not Taken in Reves,* 51 *Wash & Lee L.Rev.* 61. 78-79 (1994) (questioning the reasoning by which the Supreme Court deduced the existence of the "operation-or-management" test).

Until the decision in *Reves, supra,* the operation-or-management test had not gained general acceptance in the federal courts. Some courts did anticipate the Supreme Court's ultimate decision and applied an operation-or-management test. *See, e.g., United States v. Mandel,* 591 *F.*2d 1357, 1374-75 (4th Cir.1979), *rehearing den.* 609 *F.*2d 1076 (4th Cir.1979), *cert. denied,* 445 *U.S.* 961, 100 *S.Ct.* 1647, 64 *L.Ed.*2d 236 (1980); *Bennett v. Berg,* 710 *F.*2d 1361, 1364 (8th Cir. 1983) (en banc), *cert denied sub nom Prudential Ins. Co. of America v. Bennett,* 464 *U.S.* 1008, 104 *S.Ct.* 527, 78 *L.Ed.*2d 710 (1983). Other federal courts interpreted the "conduct or participate" language of the RICO statute to rquire an even greater showing of supervisory authority. *E.g., Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union, 639,* 913 *F.*2d 948, 954 (D.C.Cir.1990), *cert. denied,* 501 *U.S.* 1222, 111 *S.Ct.* 2839, 115 *L.Ed.*2d 1007 (1991) (holding that defendant must "exercise[] significant control over or within an enterprise," such as by participat[ing] in directing the enterprise toward its... goals or paticipat[ing] in exercising control over an enterprise so as to reset its goals"). Finally, some federal courts found the "conduct or participate" element not to require any showing of supervisory authority. *E.g., United States v. Scotto,* 641 *F.*2d 47, 54 (2d Cir.1980), *cert. denied* 452 *U.S.* 961, 101 *S.Ct.* 3109, 69 *L.Ed.*2d.971 (1981) (ruling that "conduct of the activities of an enter-

prise, through a pattern of "racketeering" can be done "by virtue of [one's] position in the enterprise or involvement in ... affairs of the enterprise" or when "the predicate offenses are related to the activities" of the enterprise); *Cincinnati Gas & Elec. Co. v. Generla Elec. Co.*, 656 *F.Supp.* 49, 86-87 (S.D. Ohio 1986) (ruling that under "the precise language of the one statute," participation "means to perform activities necessary or helpful to the operation of the enterprise, whether directly or indirectly").

Our own legislative history relating to the question of the nature of participation necessary for a RICO conviction is sparse. However, in enacting the statute, the Legislature sought "to prevent, disrupt and eliminate the infiltration of organized crime type activities which are substantial in nature into the legitimate trade or commerce of the State." *N.J.S.A.* 2C:41-1.1c. In order to prevent that evil, the Legislature saw the need "to provide that activity which is inimical to the general health, welfare and prosperity of the State and its inhabitants be made subject to strict civil and criminal sanctions." *Ibid.* Insofar as the activity of those who do not manage or supervise racketeering activity, but nevertheless knowingly assist it, is inimical to the interests identified, we see no reason why the Legislature would not seek to proscribe their conduct as well as that of their bosses.

We note also that the racketeering statute was enacted in one part of an omnibus crime bill, which additionally amended various other sections of the Criminal Code. *L.*1981, *c.* 167. One such amendment added a new paragraph to the general conspiracy statute. *L.*1981, *c.* 167, ‡ 3. *N.J.S.A.* 2C:5-2g, entitled "Leader of Organized Crime," provides that "[a] person is a leader of organized crime if he purposefully conspires with others as an organizer, supervisor or manager,..." Similarly, in the Comprehensive Drug Reform Act of 1986, *L.*1987, *c.* 106, the Legislature declared its intention to "target... the upper echelon members... of an organized drug distribution scheme," and defined "Leader of Nacotics Trafficking Network" thus: "[a] person is a leader of a narcotics trafficking network if he conspires with others as an organizer, supervisor, financier or manager..." *N.J.S.A.* 2C:35-3. *See also State v. Afanador,* 134 *N.J.* 162, 172-73, 631 *A.*2d 946 (1993) (construing the word "organizer," in conjunction with the terms "supervisor, financier or manager" in *N.J.S.A.* 2C:35-3, to require the "exercise[] [of] some ability to dictate the conduct of others in a drug-trafficking scheme"). Because the Legislature has shown that it can craft a criminal statute to reach only those performing supervisory functions, we are confident

that if it intended in RICO to cover only managers or supervisors, it would have done so expressly. *See Brewer v. Porch,* 53 *N.J.* 167, 174, 249 *A.*2d 388 (1969) (noting that Legislature is assumed to be thoroughly conversant with its own statutes.)

Further support for the determination that the New Jersey statute does not require proof that a defendant's role is supervisory or managerial appears in the statute's liberal construction clause, *N.J.S.A.* 2C:41-6, which specifies those subjections of the RICO Act that "shall be liberally construed." Among the sections entitled to a liberal construction is *N.J.S.A.* 2C:41-2c, in which the "conduct or participate" language appears.

In the period since *Reves,* federal courts often seek to emphasize the breadth of the "operation or management" test. *E.g., Aetna Cas. Sur. Co. v. P & B Autobody,* 43 *F.*3d 154, 1559-60 (1stCir.1994) (rejecting argument that defendants engaged in defrauding insurance companies through false claims did not participate in operation or management of organization). Indeed, the Supreme Court itself explained in *Reves* that the standard would not limit liability only to upper management. Rather, an enterprise is operated also "by lower-rung participants... who are under the direction of upper management" or "by others 'associated with' the enterprise who exert control over it as, for example, by briber." *Reves, supra,* 507 *U.S.* at—, 113 *S.Ct.* at 1173, 122 *L.Ed.*2d at 540 (footnote omitted).

[13,14] For those several reasons, we conclude that the New Jersey statute does not contain a requirement that in order "to conduct or participate in an enterprise," a defendant must be found to exercise responsibilities of "operation or management." We hold that under *N.J.S.A.* 2C:41-2c, a person is "employed by or associated with an enterprise" if he or she has a position or a functional connection with the enterprise that enables him or her to engage or participate directly or indirectly in the affairs of the enterprise. Further, we hold that to conduct or participate in the affairs of an enterprise means to act purposefully and knowingly in the affairs of the enterprise in the sense of engaging in activities that seek to further, assist or help effectuate the goals of the enterprise. Those activities may include acts that are managerial or supervisory or exercise control and direction over the goals, or over the methods used to achieve the goals, of the enterprise. Participatory conduct or activities also may be found in acts that are below the managerial or supervisory level, and do not exert control or direction over the affairs of the enterprise, as long as the actor, directly or indirectly,

knowingly seeks to carry out, assist, or further the operations of the enterprise or otherwise seeks to implement or execute managerial or supervisory decisions.

B.

The RICO conspiracy proscribed by N.J.S.A. 2C:41-2d consists of an agreement to violate the substantive provisions of the RICO Act. Hence, our understanding of the elements of a RICO conspiracy rests in large measure on the meaning of the substantive paticipation provision of the statute contained in subsection c.

As analyzed in *United States v. Neapolitan,* 791 *F.*2d 489, 494-500 (7th Cir.), *cert. denied,* 479 *U.S.* 939, 940, 107 *S.Ct.* 421, 422, 93 *L.Ed.*2d 371, 372 (1986), a RICO conspiracy has two separate elements: an agreement to violate RICO and the existence of an enterprise. The agreement to violate RICO itself has two aspects. One involves the agreement proper, that is, an agreement to conduct or participate in the conduct of the affairs of the enterprise. The other involves an agreement to the commission of at least two predicate acts. If either agreement is lacking, the defendant has not embraced the objective of the conspiracy—the substantive violation of the RICO Act—that is required for any conspiracy conviction under classic conspiracy law. *Id.* at 498-99. *See Koger v. State,* 513 *N.E.*2d 1250, 1255 (Ind.App.1983), adopting the reasoning of *Neapolitan* notwithstanding absence of separate state RICO conspiracy provision), *State v. Porto,* 591 *A.*2d 791, 795 (R.I.1991) (same).

Courts, in analyzing the elements of a RICO conspiracy, generally concur that the level of awareness of a defendant need not be extensive. A defendant must have some minimal knowledge of the extent of enterprise, *United States v. Diecidue,* 603 *F.*2d 535, 556 (5th Cir.1979), *cert. denied,* 445 *U.S.* 946, 100 *S.Ct.* 1345, 63 *L.Ed.*2d 781 and 446 *U.S.* 912, 100 *S.Ct.* 1842, 64 *L.Ed.*2d 266 (1980), but need not know the identities of all the conspirators, nor need a defendant know all the details of the enterprise. *Riccobene, supra,* 709 *F.*2d at 225. It is sufficient if a defendant knows "the general nature of the enterprise and know[s] that the enterprise extends beyond his individual role." *United States v. Eufrasio,* 935 *F.*2d 553, 57 n. 29 (3d Cir.1991) (quoting *United States v. Rastelli,* 870 *F.*2d 822, 828 (2nd Cir.), *cert. denied,* 493 *U.S.* 982, 110 *S.Ct.* 515, 407 *L.Ed.*2d 516 (1989))).

[15] Greater controversy surrounds the question of the nature of the agreement required of a RICO conspirator. The debate focuses on

whether a defendant must agree to commit *personally* at least two acts of racketeering or whether a defendant's agreement that others will commit the predicate acts is sufficient.

In *United States v. Elliott, supra,* 571 *F.*2d at 902, one of the earliest cases to discuss the elements of a RICO conspiracy, the court expressed the view that "Congress intended to authorize the single prosecution of a multi-faceted, diversified conspiracy by replacing the inadequate 'wheel' and 'chain' rationales [for conspiracy] with a new statutory concept: the enterprise." Although ruling only that the government must prove an agreement to participate in the enterprise's affairs through a pattern of racketeering activity, the Court in *United States v. Winter,* 663 *f.*2d 1120, 1136 (1st Cir.1981), *cert. denied,* 460 *U.S.* 1011, 103 *S.Ct.* 1249, 1250, 75 *L.Ed.*2d 479 (1983), relied on *Elliott* to hold that a RICO conspiracy required a defendant to agree to commit personally two or more predicate acts. Other courts follow *Elliott* and *Winter* in holding that to be convicted of a conspiracy to violate RICO, a defendant must agree to commit personally two acts of racketeering activity. *E.g., United States v. Ruggiero,* 726 *F.*2d 913, 921 (2d Cir.), *cert. denied,* 469 *U.S.* 831, 105 *S.Ct.* 118, 83 *L.Ed.*2d 60 (1984); *United States v. Sutherland,* 656 *F.*2d 1181, 1191-94 (5th Cir.1981), *cert. denied,* 455 *U.S.* 949, 102 *S.Ct.*1451, 117, 71 *L.Ed.*2d 663, 852 (1982); *Riccobene, supra,* 709 *F.*2d a 224-25.

However, many federal circuits find that a RICO conspiracy agreement exists when a defendant agrees to participate in the conduct of an enterprise's affairs with the knowledge and intent that someone associated with the enterprise will commit at least two predicate acts. *Banks, supra,* 918 F.2d at 421; *United States v. Pryba,* 900 *F.*2d 748, 760 (4th Cir.), *cert. denied,* 498 *U.S.* 924, 111 *S.Ct.*305, 112 *L.Ed.*2d 258 (1990); *United States v. Neapolitan, supra,* 791 *F.*2d a 494; *United States v. Joseph,* 781 *F.*2d 549, 554 (6th Cir.1986); *United States v. Adams,* 759 *F.*2d 1099, 1116 (3rd Cir.), *cert. denied,* 474, *U.S.* 906, 971, 106 *S.Ct.* 275, 336, 88 *L.Ed.*2d 236, 321 (1985); *United States v. Kragness,* 830 *F.*2d 842, 860 (8th Cir.1987); *United States v. Carter,* 721 *F.*2d 1514, 1531 (11th Cir.), *cert. denied,* 469 *U.S.* 819, 105 *S.Ct.* 89, 83 *L.Ed.*2d 36 (1984).

Our legislative history is silent as to the meaning of the conspiracy provisions of the RICO statute. The fairest implication of this silence is that the Legislature intended that general conspiracy law apply to prosecutions for conspiracy to violate RICO. *See Federal Insurance Co. v. Ayers,* 72 *F.Supp.* 1503, 1509 (E.D.Pa.1991) (relying on *N.J.S.A.* 2C:5-2 to grant plaintiff's motion for summary judgment on RICO conspiracy liability), *reconsid. denied,* 1991 WL-274836 (E.D.Pa.1991). Our finding

of that intent is in fact impelled by the RICO statute itself, *N.J.S.A.* 2C:41-2d, which incorporates the definition of "conspiracy" contained in the Code of Criminal Justice, *N.J.S.A.* 2C:5-2b.

[16] Under traditional standards, the gravamen of the crime of conspiracy is the criminal agreement. *State v. Dennis,* 43 *N.J.* 418, 423, 204 *A.*2d 868 (1964). A conspiracy conviction does not turn on "doing the act, nor effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement..." *State v. Carbone,* 10 *N.J.* 329, 337, 91 *A.*2d 571 (1952). That traditional understanding is codified in the Criminal Code definition of conspiracy:

> "[a] person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
>
> (1) Agrees with such other person or persons that they or one or more of them will engage in conduct with constitutes such crime***
>
> [*N.J.S.A.* 2C:5-2a.]

[17] Moreover, to be guilty of conspiracy, the conspirators do not have to know each other, nor need they have personal knowledge of the outcome of the plan, *State v. Stefanelli,* 78 *N.J.* 418, 428-29, 396 *A.*2d 1105 (1979), and they do not have to join in the common purpose at the same time. *State v. Spruill,* 16 *N.J.* 73, 80-81, 106 *A.*2d 278 (1954). The Code reflects that understanding, providing that a person may be guilty of conspiring with others to commit a crime "whether or not he knows their identity." *N.J.S.A.* 2C:5-2b.

The federal understanding of the RICO conspiracy offense comports with our traditional treatment of conspiracy. Federal RICO was enacted against the backdrop of traditional conspiracy law. "Under classic conspiracy law, agreeing to the commission of the conspiracy's illegitimate objectives constitutes the crime." *Neapolitan, supra,* 791 *F.*2d at 496; *accord Carter, supra,* 721 *F.*2d at 1529; *Pryba, supra,* 900 *F.*2d at 760. A defendant may be guilty of a RICO conspiracy without comitting a substantive RICO offense. In *Jones v. Meridian Towers Apartments, Inc.,* 816 *F.Supp.* 762, 772-73 (D.D.C. 1993), the court determined that a conviction for a RICO conspiracy under subsection (d) requires that a defendant agree to violate RICO, regardless of whether he or she agreed to commit personally the predicate acts of subsection (c). That

analysis, it reasoned, "applies equally to the conduct or participation requirement" of subsection (c) and, hence, to prove a conspiracy violation, the government need not show that the conspirator participated to the extent required by federal law under subsection (c), according to the *Reves* test. *See United States v. Quintanilla,* 2 *F.*3d 1469, 1484-85 (7th Cir.1993) (following *Jones); Morin v. Trupin,* 832 *F.Supp.* 83, 99)(S.D.N.. 1993) (same); *Fidelity Fed. Sav. & Loan Ass'n. v. Felicetti,* 830 *F.Supp.* 257, 261 (E.D.Pa.1993) (same).

[18, 19] A fundamental tenet of RICO construction is that RICO creates new remedies but not new crimes, such that "a conspiracy to violate RICO should not require anything beyond that required for a conspiracy to violate any other federal crime." *Neapolitan, supra,* 791 *F.*2d at 497. When read together, subsections (c) and (d) under RICO "speak only to 'conspiring to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity, *i.e.,* two acts of racketeering activity within at least ten years of each other.' " *Carter, supra,* 721 *F.*2d at 1529. The phrase "through a pattern of racketeeering activity" modifies the language preceding it, "the conduct of such enterprise's affairs," rather than the phrase "conspiring to conduct or participate." *Id.* at 1529 n. 22. Hence, requiring an agreement to commit personally the predicate acts in addition to agreement to the conspiratorial objective would establish a new form of conspiring with a degree of involvement that is not required of any other type of conspiracy. *Neapolitan, supra,* at 497-98; *Pryba, supra,* 900 *F.*2d at 760.

The Appellate Division here determined that there exists "no necessity that a RICO conspirator be involved in all aspects of the conspiracy, or have knowledge of all its participants." 268 *N.J.Super.* at 134, 632 *A.*2d 1222. A defendant's knowledge of the general nature of the enterprise and knowledge that the enterprise extends beyond his or her individual role is sufficient. *Ibid.* Moreover, "[f]or purposes of a RICO conspiracy, it is irrelevant whether each defendant participated in the enterprise's affairs through different and unrelated crimes, so long as the jury may reasonably infer that each crime was intended to further the enterprise's affairs." *Id.* at 110, 632 *A.*2d 1222. Accordingly, the Appellate Division held that in establishing a RICO conspiracy the State must show that a defendant

> agreed to participate directly or indirectly in the conduct of the affairs of the enterprise by agreeing to commit, or to aid other members of the conspiracy to commit, at least two racketeer-

ing acts***and that he or she acted knowingly and purposely with knowledge of the unlawful objective of the conspiracy and with the intent to further its unlawful objective.

[268 *N.J. Super.* at 99-100, 632 *A.*2d 1222]

The Appellate Division further concluded a defendant need not agree to commit personally at least two predicate acts of racketeering. We concur. That conclusion is consistent with the Code definition of conspiracy, *N.J.S.A.* 2C:5-2a, which criminalizes an agreement that others will commit the substantive crime that is the objective of the conspiracy. Further, as pointed out by the Appellate Division, requiring a defendant to agree to commit personally at least two predicate acts would " 'dilute the effectiveness of the RICO conspiracy remedy, and thwart [the legislative] objectives' " of the statute. 268 *N.J.Super.* at 123, 632 *A.*2d 1222 (quoting *Adams, supra,* 759 *F.*2d at 1116). Such a narrowing requirement could immunize a mob boss who neither agreed to commit personally nor actually participated in the commission of the predicate acts. *Ibid.* We are confident that the Legislature intended to confer no such immunity.

V

We turn, finally, to consider whether the trial court provided the jury with correct and adequate instructions on the several critical elements of the RICO substantive and conspiracy offenses and whether the evidence supported the jury's determinations of guilt.

The trial court, in instructing the jury on the elements of the substantive RICO offense, identified the following six elements of the crime:

(1) an Enterprise existed which was engaged in the unlawful disposal of solid waste within New Jersey; (2) the Enterprise engaged in or its activities affected trade or commerce; (3) the defendant was employed by or associated with the Enterprise; (4) the defendant engaged in a pattern of racketeering activity as will be defined later under the heading "Fourth Element." In order to establish such a pattern of racketeering activity the defendant must have committed at least two racketeering acts; (5) the defendant conducted or participated directly or indirectly in the conduct of the Enterprise's affairs through that pattern of racketeering activity; and (6) the defendant acted knowingly and purposely.

The Appellate Division enumerated five elements necessary to prove a violation under *N.J.S.A.* 2C:41-2c:

> (1) the existence of an enterprise; (2) that the enterprise engaged in or its activities affected trade or commerce; (3) that defendant was employed by, or associated with the enterprise, (4) that he or she participated in the conduct of the affairs of the enterprise, and (5) that he or she participated through a pattern of racketeering activity.

[268 *N.J.Super.* at 99, 632 *A.*2d 1222]

The trial court also gave particularized instructions on the critical terms: enterprise, pattern of racketeering activity, participation and conspiracy.

A.

The trial court began its definition of "enterprise" by quoting most of the text of *N.J.S.A.* 2C:41-2c. The court then identified three sub-elements that the jury must find in order to find the existence of an "enterprise." These included: "(1) an organization, formal or informal, which was ongoing; (2) in which the various associates functioned as a continuing unit; and (3) which existed separate and apart from the pattern of racketeering acts in which the various associates engaged." Further, in explaining the first sub-element, the trial court emphasized evidence "that the group had some structure for making decisions and some mechanism for controlling its own affairs on an ongoing basis." In explaining the second sub-element, the court emphasized evidence "that the associates performed roles which fit the structure of the group and furthered its aims and activities" and that "the group must have an existence beyond what is necessary merely to commit the racketeering acts." The trial court also charged the jury that it must find that the enterprise had an existence separate from that necessary merely to commit the racketeering acts. The court concluded its instruction on the enterprise element by informing the jury that it could convict only on a finding of a *single* enterprise.

[20] We are satisfied that the convictions can be affirmed, while yet endorsing neither the very broad definition of "enterprise" applied by the Appellate Division, 268 *N.J.Super.* at 143, 632 *A.*2d 1222, nor the requirement of a structure beyond that necessary to commit the racketeering acts, as suggested by the trial court. That requirement of a structure imposed an additional factor to be proved by the State, and clear-

ly its inclusion in the instruction did not prejudice defendants.

[21]Defendants also argue that no jury can find the existence of an "enterprise" unless it finds the existence of "common purpose," and concluded thta because the trial court never so instructed the jury, the convictions cannot stand. Defendants contend that they had no such purpose because each was interested chiefly in his own profit. The Appellate Division found that the trial court's charge adequately communicated the substance of the element of "common purpose." Moreover, the Appellate Division noted that this claim was raised as plain error, and that defendants have not shown prejudice. 268 *N.J.Super.* at 108-09, 111-14, 632 *A.*2d 1222.

In assessing the evidence, the Appellate Division characterized the defendants as forming

> a somewhat disorganized group of individuals. They had no real "leader" as that term is commonly understood; there was no one to whom all members owed allegiance, or to whom all members are required to report. In fact, the group's members did not even seem to like each other, and were often engaged in double-dealing and back-stabbing. However, they deliberately associated themselves with one another in order to make money from illegal dumping.

[*Id.* at 107, 632 *A.*2d 1222]

The adequacy of the evidence to support the jury's determination of the existence of an enterprise is also demonstrated indirectly by the trial court's disposition of defendants' motion for an acquittal based on the grounds that the State had not proven the existence of an "ascertainable structure." In evaluating the evidence and denying the motion, the trial court noted the common purpose of the associates, the continuing character of their efforts, and their functional division of labor. *See* 268 *N.J.Super.* at 105, 632 *A.*2d 1222.

The evidence demonstrates that defendants were at the core of a large-scale dumping scheme involving many people. All were aware of the illegal objective of the enterprise, and they discussed their plans frequently. The dirt brokers solicited the dumpers, arranged for the provision of dump sites, and generally oversaw the entire operation. The public-official defendants functioned as protectors of the scheme and deliberately frustrated official investigations into the dumping. Various other persons, such as the lookouts and the individual haulers, performed distinct roles integral to the running of the enterprise.

Defendants planned where the dumping would occur and determined when sites had to be switched. The scheme required notice of when and where to dump each evening and the falsification of public records. The scheme thus entailed an enterprise that displayed an "organization" of its members as evidenced by the interaction of the participants, and the extensive planning, coordination and cooperation necessary to effectuate its objectives.

B.

We consider next the correctness of the instruction and the sufficiency of the evidence with respect to the element of "pattern of racketeering activity."

The trial court began its instruction on this element by noting that it requires proof of at least two racketeering acts, and then instructed the jury on the elements of the various alleged predicate offenses themselves. With respect to the necessity of a "pattern," the court noted that proof of two racketeering acts is necessary but not sufficient. Its instruction contains within it strong suggestions of both relatedness and continuity requirements.

In addition to quoting the statute, *N.J.S.A.* 2C:41-2c, the court stated that

> in determining whether racketeering acts constitute a pattern, you should consider whether the acts are related to each other or to the affairs of the Enterprise. The acts may be considered related if, due to the organization, duration and objectives of the Enterprise, the acts posed a threat of a series of criminal violations over a significant period of time. Acts do not constitute a pattern if they reflect merely isolated or sporadic activity. Rather, taken together, the acts must be related in some way and must reflect continuous activity during the period in which they were committed.

With respect to the continuity aspect of the pattern, the court charged:

> Evidence of continuous activity could be shown by the existence of a threat of an ongoing series of criminal violations over a significant period of time. You should consider the number of acts committed, the length of time during which they were committed, the similarity of the acts, the number of victims and any distinguishing characteristics of the acts.

The court concluded its instruction on the pattern element by stating:

> In summary, you may find that a defendant engaged in a pattern of racketeering activity if you find that the defendant committed at least two or more of the racketeering acts charged against that defendant; that the acts were related, not isolated events; and that the acts reflected ongoing activity.

With respect to the challenge to the jury instructions concerning "pattern of racketeering," the Appellate Division acknowledged that the trial court's instruction required a finding of both relatedness and continuity. 268 *N.J.Super.* at 131, 632 *A.*2d 1222. It found that the State had presented sufficient evidence for the jury to determine that defendants had agreed to commit and had committed predicate acts with the same or similar purpose and the same or similar participants to further the illegal dumping. *Id.* at 143, 632 *A.*2d 1222. "Here, 'relatedness' among the predicate acts can be inferred from the facts." *Ibid.*

[22] We are satisfied that the State provided ample evidence to prove a pattern of racketeering activity committed by defendants. That evidence demonstrates a pattern of racketeering activity under the totality of the circumstances by establishing incidents that are both related and are neither isolated nor disconnected. Defendants engaged in repeated incidents of racketeering activity that involved the same participants throughout most of the enterprise, and the same methods of commission. Defendants had a system ensuring that the enterprise ran smoothly. Clearly, the repeated criminal acts were related by having the common purpose of furthering the goal of the enterprise, which was to make money from illegal dumping. Further, the State proved that the incidents of racketeering were not isolated or sporadic events in that the illegal acts were the enterprise's regular way of doing business and were ongoing in that they occurred over a period of time and posed a threat of continuation into the future.

C.

We deal next with the instructions and the evidence concerning participation and conspiracy. We note that two defendants, Bassi and Harvan, were convicted of violating subsection c, the conduct or participation substantive offense, while all defendants were convicted of conspiracy under subsection d.

In listing the six elements of the substantive RICO crime, the trial court identified two elements relevant to the issue of the participation

of particular defendants. The trial court required the State to prove that "the defendant was employed by or associated with the Enterprise," and that "the defendant conducted or participated directly or indirectly in the conduct of the Enterprise's affairs through that pattern of racketeering activity." The court proceeded separately to define each of those elements.

With respect to the "employed by or associated with" element, the court, evidently drawing on the language by which the statute establishes the "conduct or participate" element, stated that:

> This can be shown by the defendant knowingly participating directly or indirectly in the conduct of the affairs of the enterprise. The defendant need not have known the identity of all the other participants in the enterprise or the details of the commission of each of the racketeering acts committed by others, but the defendant must have been aware of the scope and unlawful activities of the enterprise.

With respect to the "conduct or participate" element itself, the court instructed the jury that

> This element requires the State to prove beyond a reasonable doubt that a connection exists between the Enterprise on the one hand and the pattern of racketeering acts on the other hand. A connection is shown if: (1) the racketeering acts were related to the activity of the Enterprise or (2) the defendant was able to commit the racketeering acts solely because of his position in the Enterprise, or is involved in the control of the affairs of the Enterprise.

[23, 24] Although the trial court did not charge the jury literally in the terms of our formulation of the requirement of participation, its charge effectively covered each of the essential aspects of the standard we now adopt. The trial court's charge required that the participation be "knowing," and that defendants be "aware of the scope and unlawful activities of the enterprise." The charge also required that the "acts" of defendants be "related to the activity of the Enterprise" or be undertaken because of a defendant's position or control within the enterprise. That sufficiently embraces the standard that the participatory acts must knowingly seek to further or assist the operation of the enterprise or to implement or effectuate managerial or supervisory decisions. As the Appellate Division pointed out, though most of the defendants were convicted of conspiracy under subsection d, "there was ample evidence

to conclude such participation existed." 268 *N.J.Super.* at 132, 632 *A.*2d 1222. We fully concur.

Defendants were all key players in the illegal scheme, and without their participation and direction, the enterprise could not have been successful. In addition, defendants did actually commit acts of racketeering to further the conspiracy; thus, agreement to the commission of those acts is indisputable. The defendants in the action now before the Court represent only a part of the enterprise. They were, however, an important part. Joseph Mocco, otherwise known, according to the indictment, as "The Big Guy," "The King," and "God," was the Town Clerk of North Bergen. He was responsible for the issuing of all manner of permits, including permits to dump. The evidence strongly indicates that he was the supervisor of defendant Hurtuk, the license inspector, and also that Mocco held meetings in his office at which the principal participants appeared. Defendant Dulanie was the deputy chief of police, and appears to have exerted his influence to get charges dismissed against the dumpers, in return for a fee, and may also have participated in meetings at Mocco's office. Hurtuk, finally, was very active in the everyday management of the enterprise. Whenever the dumpers encountered trouble, they would summon him to the site and he would handle the problem. Also, he attempted to divert the investigation of the undercover CDJ officers away from the enterprise. Defendants Harven and Bassi appear to have been responsible for finding dumping sites and for establishing a payment schedule with people who needed to dump. Finally, there is the now-deceased defendant Ball, who as a dumper also played an important role in the enterprise.

[25] With respect to the conspiracy charge, the trial court first explained to the jury the meaning of the substantive RICO crime, and then instructed the jury on the crime of conspiring to commit substantive RICO offense. It identified the following five elements of the crime:

> (1) An Enterprise existed which was engaged in the unlawful disposal of solid waste within New Jersey;
>
> (2) the Enterprise engaged in or that its activities affected trade or commerce;
>
> (3) the defendant was employed by or associated with the Enterprise;
>
> (4) the defendant agreed to participate directly or indirectly in

> the conduct of the affairs of the Enterprise by agreeing to commit or aid some other members of the conspiracy in the commission of at least two racketeering acts as charged in the Indictment;
>
> (5) the defendant acted knowingly and purposely with knowledge of the unlawful objective of the conspiracy charged in the Indictment and with an intent to further that unlawful objective.

As for the first three elements, the trial court referred the jury to the instructions given with respect to the substantive RICO offense. On the fourth element, the court instructed the jury as follows:

> In order for you to find a defendant guilty of the crime of conspiracy, the State need not prove the defendant actually committed the crime of racketeering; rather, the State must prove beyond a reasonable doubt that the defendant with the purpose of promoting and facilitating the commission of the crime of racketeering, agreed with at least one other person referred to in the Indictment, that one of them would commit the crime or engage in conduct which would constitute the crime or an attempt to or a solicitation to commit the crime, or agreed to aid such other person or persons in the planning or commission of the crime.

The court further explained that the State need not prove the actual commission of racketeering, but only that the defendant "agreed to participate directly, or indirectly in the conduct of the affairs of the racketeering enterprise and agreed to the commission of at least two racketeering acts." The court proceeded to give other general instructions on the elements a conspiracy. Relevant to the issues raised on appeal was the instruction that:

> To be a member of the conspiracy, a person need not know all the details of the conspiracy or know all its members, or the details of the commission of the racketeering acts by others, but the defendant must be aware of the scope and unlawful activities of the conspiracy."

We are satisfied that the trial court's instruction correctly conveyed to the jury the standards for determining a RICO conspiracy.

[26] We agree with the Appellate Division, 268 *N.J.Super.* at 135, 632 *A.*2d 1222, that the evidence was more than sufficient to support the

conspiracy convictions.

VI

The judgments of conviction are affirmed.

For affirmance—Chief Justice WILENTZ and Justices HANDLER, POLLOCK, O'HERN, GARIBALDI and STEIN-6.

Opposed—None.